

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON AT SEATTLE

3
4 MICROSOFT CORPORATION,)
5 Plaintiff,) C10-1823-JLR
6 v.) SEATTLE, WASHINGTON
7 MOTOROLA INC., et al,) August 28, 2013
8 Defendant.) TRIAL
9)

10 VERBATIM REPORT OF PROCEEDINGS
11 BEFORE THE HONORABLE JAMES L. ROBERT
12 UNITED STATES DISTRICT JUDGE

13 APPEARANCES:

14
15
16 For the Plaintiff: Arthur Harrigan, Christopher
17 Wion, David Pritikin Richard
18 Cederoth, Andy Culbert, Nathaniel
Love and Ellen Robbins

19
20 For the Defendants: Ralph Palumbo, William Price
21 Brian Cannon, Kathleen Sullivan
22 Andrea Roberts and Philip McCune
23
24
25

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1 THE COURT: The clerk will call this matter.

2 THE CLERK: C10-1823, Microsoft versus Motorola.

3 Counsel, please make your appearances for the record.

4 MR. HARRIGAN: Good morning, your Honor. Art
5 Harrigan representing Microsoft. To my right is Shubham
6 Mukherjee from the Sidley firm, Mr. Pritikin, Mr. Cederroth,
7 and Mr. Culbert from Microsoft, Ms. Robbins and my partner,
8 Chris Wion.

9 MR. PALUMBO: Ralph Palumbo from Motorola, and we
10 have our usual crew with us this morning, Mr. Price,
11 Mr. Cannon, Ms. Sullivan, Ms. Roberts.

12 THE COURT: Thank you. It is my job to keep you
13 apprised of any communications I received from the jury. One
14 has called to say she is getting off the bus right now and
15 will arrive here shortly. A different one from the one
16 yesterday. Another one has asked if she could use a pad with
17 a backing as opposed to a steno notebook. And I have
18 consented to that without consulting with you. Third, we
19 have one who wanted us to bring in a large pad of paper and a
20 lot of stickies. Apparently in anticipation for jury
21 deliberations. I have said that's fine also.

22 The juror who was very concerned about her employer not
23 paying for her second week of jury service, the general
24 counsel has kindly consented they would be delighted to pay
25 for a second week. And they don't even have any cases

1 pending in federal court. That's good. I think that's
2 everything we have heard from them recently. They are all
3 exclusively housekeeping details.

4 In terms of housekeeping details, I would like to run
5 through with you my notes about where we are and our
6 remaining time. I have been leaving on your tables a summary
7 of how much time you have used each day and how much time you
8 have remaining. Using that as my guide, today is a testimony
9 day. Tomorrow is a testimony day. I would like to schedule
10 the informal jury conference for 4:00 tomorrow, so we will be
11 stopping testimony presentation a half hour early. Remember,
12 when we had our pretrial conference, that's where you can all
13 take your jackets off, there is no court reporter. You have
14 had the court's proposed instructions for a while. It is
15 simply a chance for you to tell us if there are things in
16 there that you think are wrong so we can look at those
17 questions, things that you think -- you have proposed and you
18 think we should give that we haven't given and why. And then
19 armed with that, we will prepare the final set. That should
20 give us Friday to do further testimony. Monday, you will
21 recall, is a holiday. Tuesday morning we will have
22 exceptions taken. And that will probably be 8:30. And those
23 will be on the record, formal exceptions, if you're not
24 familiar with -- I'm not sure what the standards are in the
25 federal circuit, but the standards in the Ninth Circuit are a

1 little unusual. Please review that. And by my calculations,
2 you should finish your testimony on Tuesday.

3 If that all works that way, then I'm going to change my
4 allotment of time for you, and give you your full 16 hours
5 for presentation of testimony, because that will leave us
6 Wednesday to finish up any testimony, though I don't think
7 there should be any, for me to read instructions and then for
8 you all to do your closings. I would like to get you pinned
9 down to a formal length of your closing, because I need to
10 structure that around breaks and lunch. I really prefer to
11 do closings back-to-back as opposed to having an interlude
12 between them.

13 Mr. Harrigan, I'm not sure who is going to do closing.
14 Can I assume that you will take no more than 90 minutes?

15 MR. HARRIGAN: That's the number on our schedule --
16 our own internal schedule, your Honor.

17 THE COURT: Are you willing to more formally commit
18 to that, since I'm afraid you have lost track of time
19 previously?

20 MR. HARRIGAN: I am happy to abide by 90 minutes.

21 THE COURT: There is nothing magic about it. If you
22 want longer, just tell me. But it changes when I schedule
23 lunch and some of the other considerations. Please don't
24 feel like I am trying to force this on you, but it is very
25 helpful for me to know. I'm not sure who is speaking --

1 Mr. Price.

2 MR. PRICE: Your Honor, 90 minutes seems about right.

3 THE COURT: Unless the defendant wants to go after
4 lunch, so Microsoft would go, and then you will have a break,
5 that's the other alternative. In my practice that is not a
6 good idea. Any thoughts?

7 MR. HARRIGAN: Just for clarification, your Honor, we
8 would anticipate using 15 minutes or so for --

9 THE COURT: I understand that.

10 MR. PRICE: Your Honor, I'm somewhat indifferent.
11 Actually whatever fits the court's schedule.

12 THE COURT: The second hardest thing we have to do
13 around here, other than get pens and pencils, is get lunch
14 brought in. They will be ordering lunch early in the
15 morning. If we can do them back-to-back that will be good,
16 and I will put you down for 90 minutes. Those were all of my
17 housekeeping details.

18 Mr. Harrigan, I understand you had something?

19 MR. HARRIGAN: We would like to add one housekeeping
20 detail. I haven't personally done the arithmetic, but I am
21 informed our remaining time should be ten hours and 44
22 minutes, not 14 minutes. If you could revisit the math and
23 tell us whether that is right or wrong, we would appreciate
24 it. Not necessarily this second. And then we have another
25 matter that Mr. Pritikin will raise.

1 THE COURT: Mr. Pritikin.

2 MR. PRITIKIN: Good morning, your Honor. This
3 relates to two exhibits that were added last night,
4 presumably for use with Mr. Dailey this morning. Let me hand
5 up copies. I have only handed you the one that we have a
6 problem with, your Honor. There is a second exhibit, which
7 has been marked as 7254, and we don't have a problem with
8 that one. 7253, Mr. Price tells me that it is not planned
9 for the direct examination, so we may be dealing with
10 something that is hypothetical here.

11 MR. PRICE: Your Honor, just to move things along,
12 this one is a complete hypothetical. It was added only if
13 there is going to be an objection to the foundation of the
14 second one.

15 MR. PRITIKIN: That would solve the problem, as long
16 as this isn't offered.

17 THE COURT: All right.

18 MR. PRITIKIN: That was easy.

19 THE COURT: Mr. Price, anything on behalf of
20 Motorola?

21 MR. PRICE: We just need to make sure the only people
22 in the courtroom are folks who signed the protective --

23 THE COURT: Let me ask one question first. Do we
24 have our full jury?

25 THE CLERK: Yes.

1 THE COURT: Do we have anyone in the courtroom -- If
2 everyone will turn around who is not covered -- or is covered
3 under the protective order. There are four Starbucks within
4 walking distance.

5 (Closed proceedings.)

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THE COURT: Mr. Price, do you have further questions?

11

MR. PRICE: I was going to wait for the public to

12

come in.

13

THE COURT: Let's start.

14

By Mr. Price:

15

Q Mr. Dailey, I would like you to look at a document we

16

looked at yesterday that is in evidence, 7242. That was a

17

presentation that was made to HTC in 2009. Do you see that?

18

A Yes.

19

Q If we go to Page 11 here, we were focusing on this, which

20

was a presentation to HTC about 802.11 patents. Do you see

21

that?

22

A Yes.

23

Q And this had the -- The third bullet point has what as

24

the standard rate?

25

A Yes, it had the 2.25 percent.

1 Q Now, after this presentation, were there further
2 discussions with HTC?

3 A We did have further discussions, yes.

4 Q And as a result of further discussions, what happened with
5 respect to what Motorola then suggested to HTC?

6 A We expanded the scope of the discussion to include more
7 technologies, both essential and nonessential.

8 Q If you look at Exhibit 3162, could you tell us what 3162
9 is?

10 A 3162 is a copy of a presentation made in 2011 with
11 HTC concerning broadening -- continuing the discussions, but
12 broadening the context. If you look at --

13 Q First, let me do something.

14 MR. PRICE: Your Honor, I would move Exhibit 3162
15 into evidence.

16 THE COURT: Any objection?

17 MR. PRITIKIN: No, sir.

18 THE COURT: It is admitted and it may be published.

19 (Exhibit 3162 admitted.)

20 By Mr. Price:

21 Q Can you tell us, sir, how the offer changed after
22 negotiations?

23 A We were continuing negotiations with HTC, and we expanded
24 from just discussing 802.11 to including LTE or 4G
25 technologies, H.264 -- If you look on slide 6, there is a

1 pretty good illustration of all of the technologies we were
2 talking to HTC about at that point, location-based
3 applications, proximity sensor, E911, and it should have been
4 wireless e-mail as well, on the right-hand side.

5 Q Are all of these patents that were being discussed
6 standards-essential patents?

7 A No, it was a mix of standards and non-standards-essential.

8 Q What kind of non-standards-essential patents was Motorola
9 offering in its portfolio to HTC?

10 A The non-standards-essential would have been the wireless
11 e-mail patents. The E911 may or may not have been a
12 standard. I'm not sure. Location-based applications,
13 proximity sensor -- we also -- and application management
14 would have been nonessential portions of the discussion.

15 Q And so why in the negotiations -- After the initial offer
16 of 2.25 on 802.11, why did Motorola then, during
17 negotiations, come to a point where it was offering all of
18 these non-standards-essential patents and other patents?

19 A We were doing that because both parties were looking for
20 patent peace and we wanted to resolve all of the patent
21 problems between the companies. We were looking to broaden
22 the discussion. Both parties were looking to have a broader
23 agreement, a settlement.

24 Q And if you would look at the last page, Page 8, did this
25 sort of provide an overview of the terms that you were

1 suggesting?

2 A Yes. This is a real high-level term sheet, a 15-year
3 term, which patents, essential and nonessential, would be
4 included, which products would be licensed, and then the
5 royalty rate and base.

6 Q And so on the royalty rate and base, you have 2.25
7 covering patents that you then list up there under "patents"?

8 A That's right. And it would have been on the net selling
9 price of the device.

10 Q Let me ask you, by the way, at the time in October when
11 Microsoft, after you had been sued, and they asked you to --
12 they said put your patents on the table, how many patents did
13 Motorola have?

14 A Motorola had approximately 10,000 U.S. patents -- grants
15 of patents.

16 Q And what sorts of areas did those cover that might have
17 some relevance to Microsoft?

18 A We knew wireless e-mail would have relevance. Some voice
19 recognition activity, location-based services they use on
20 smartphones. It would have been technologies -- We had some
21 early operating system development technologies as well. So
22 it was a mix of essential and nonessential patents that would
23 have been relevant.

24 Q Now, I want to take you back now to October 22nd, 2010.
25 And maybe we can put up a timeline -- I will put it up on

1 the monitor so I don't kill anybody with the board. If you
2 look at the monitor, we have added one little thing here.
3 That is the meeting of GCs in Seattle. First, let me ask you
4 about an inaccuracy here. You see that has six people at the
5 table. How many were actually there?

6 A There was just four people.

7 Q Was the table a bit bigger than this one?

8 A It was. It was a very nice conference room.

9 Q After that meeting, and after you left - you talked about
10 it yesterday, so I don't want to summarize it too much - you
11 then sent out the October 29th, 2010, letter?

12 A Yes.

13 Q Let me ask you, between October 21st and November 9th,
14 when Microsoft sued Motorola for the third time, between that
15 timeframe, what response did you get from Microsoft to those
16 two letters?

17 A I don't recall receiving any response. No response.

18 Q Now, I would like you to look, if you would, at
19 Exhibit 7241. Do you recognize what 7241 is?

20 A This was an e-mail I received from Horacio Gutierrez on
21 November 9th, forwarding the copy of the complaint that they
22 had filed.

23 Q And when you refer to the complaint they had filed -- If
24 we can go back to the timeline very quickly. This is the
25 complaint that was filed here on November 9, 2010, where

1 Microsoft sued Motorola in this courtroom, correct?

2 A Yes.

3 MR. PRICE: Your Honor, I move 7241 into evidence.
4 It would be the entire exhibit that we will be moving into
5 evidence.

6 MR. PRITIKIN: This exhibit I would object to, 401,
7 402 and 403, your Honor.

8 THE COURT: Does someone have a hard copy of the
9 exhibit?

10 MR. PRICE: Yes.

11 MR. PRITIKIN: Your Honor, maybe the copy I have in
12 this binder is incomplete. Let me find out from Mr. Price.

13 No objection to the attachment, your Honor. It is the
14 cover e-mail my objection relates to.

15 THE COURT: I will overrule the objection.

16 (Exhibit 7241 admitted.)

17 By Mr. Price:

18 Q I would ask that you put 7241 up. If we could look at the
19 bottom of this. Do you see it says, "From Brad Smith to
20 Scott Offer," dated November 9, 2010? Could you tell us who
21 is Brad Smith? Who is sending the e-mail?

22 A Brad Smith is the general counsel of Microsoft.

23 Q And then who is the recipient? Who is it being sent to?

24 A He is sending it to Scott Offer, who is the general
25 counsel of Motorola Mobility.

1 Q And you say, "Scott, as discussed, here are the papers as
2 filed. I look forward to talking again and to, no doubt,
3 reading in the very near the work of your very good
4 litigation team. Brad."

5 I just want to ask, did you get this yourself from
6 Mr. Smith?

7 A No, I did not.

8 Q So how did you get a copy then of this e-mail that
9 Microsoft's general counsel had sent to Motorola?

10 A Horacio Gutierrez forwarded me the e-mail that Brad had
11 sent to Scott.

12 MR. PRICE: Your Honor, I have no further questions.
13 I do have a request for a short sidebar.

14 THE COURT: What topic?

15 MR. PRICE: A topic of a corrective instruction.

16 THE COURT: All right. I will see you at sidebar.
17 (Sidebar discussion out of the presence of the jury.)

18 MR. PRICE: It is actually a requesting of a
19 corrective limiting instruction. One, my understanding is
20 that when reading the court's order that said there was not
21 going to be a reference to "the court," and that instead to
22 "facts." And one of the facts that was read was that the
23 court had found that Motorola was wrong, was the substance.
24 And I believe that went beyond. I would like to ask that the
25 jury be instructed to disregard that.

1 The second, because we have gotten into the allegations in
2 the litigation with RIM, and Microsoft has made quite a big
3 deal about the fact that there was an accusation that it was
4 inappropriate to go to the ITC, I think there should be a
5 limiting instruction -- a limiting instruction to the jury
6 that accusation is not to be taken as evidence of a fact that
7 Motorola did anything inappropriate in going to the ITC.

8 MR. PRITIKIN: Your Honor, you warned the parties
9 before the trial began that if they waded into the subjects
10 that are covered by the findings, particularly where they
11 offer partial testimony where they are going to be impeached,
12 that the findings could and would be used. They brought this
13 on themselves. They are trying to kind of slide through and
14 use RIM in a way that is helpful and duck other parts of it.
15 All we did was read the finding. I think at some point they
16 have crossed the line. As I said, they brought it upon
17 themselves. I don't think any kind of further instruction is
18 necessary at this point.

19 THE COURT: I am not going to go back on the comment
20 about the court. I think that will only draw more attention
21 to it than it is probably worth. I am concerned about the
22 ITC provision. What would you ask the court to say?

23 MR. PRICE: I would ask the court to say: There was
24 testimony that there was litigation between RIM and Motorola,
25 and that part of that litigation involved accusations on both

1 sides, and one of those accusations was that Motorola
2 breached its RAND agreement by going to the ITC. I have
3 instructed you that you are not to take that as any evidence
4 whatsoever that Motorola in fact breached any obligation by
5 going to the ITC.

6 MR. PRITIKIN: I would strenuously object to an
7 instruction like that. That will carry over into this case.
8 That is part of the practice and conduct that is at issue
9 here. I think there is nothing in that -- there is nothing
10 there that is in any way misleading or leads to the
11 impression that going to the ITC was the conduct that was
12 wrong. What it says is the -- The point of it is that's
13 what put the pressure on them, and that explains why they
14 caved and agreed to the high royalties that were in the
15 agreement. That's precisely what the court found.

16 MR. PRICE: Those are two different issues. And
17 there may be one reason for agreeing on a particular amount.
18 And one reason might be that you have breached patents and
19 there is an injunction looming. The second issue is whether
20 there was wrongful conduct in connection with that pressure.
21 And what Microsoft is suggesting is that royalty was arrived
22 at by wrongful conduct. The court never found that conduct
23 was wrongful. And so the limiting instruction I am asking is
24 that this jury cannot consider that as being evidence of
25 anything wrongful. That is not this case. That is a

1 completely different case with different facts. And
2 obviously Microsoft has told you that is not what --

3 THE COURT: I am not going to give -- I will break
4 this into two parts. I am not going to go back and do
5 anything about the reference that the court found something
6 or said something. I think that's -- I think the jury
7 understands these are findings and they were done by the
8 court. I don't think there is any reason to do that.

9 As to the latter, I am going to permit the record to stand
10 as it is. It seems to me that, as I understand Motorola's
11 defense in this, they are saying that they wrote these
12 letters, and that they expected further negotiations.
13 However, they also then took conduct in this case in regards
14 to proceedings that Motorola was involved in and that
15 Microsoft initiated in the ITC. And I think you will be
16 trying to -- get into trying to parse that out. I am not
17 willing to draw a clear line as to any fact other than there
18 is a business pressure created by that. I think that's what
19 the findings said, and that's what I am going to continue to
20 hold.

21 MR. PRICE: Your Honor, will I get the opportunity to
22 put something in writing? What I am worried about is the
23 accusation, not the finding; the testimony that one party is
24 accusing somebody of something wrong is not evidence
25 something is wrong. It is as simple as that. That's what it

1 is being presented as --

2 THE COURT: When you prepare something, we will take
3 it up at that time.

4 (End of sidebar conference.)

5 THE COURT: Mr. Price.

6 MR. PRICE: Pass the witness, your Honor.

7 THE COURT: Mr. Pritikin.

8 REDIRECT EXAMINATION

9 By Mr. Pritikin:

10 Q Mr. Dailey, I want to set some background here and cover
11 some areas we covered yesterday. Motorola has a lot of
12 different standards-essential patents, right?

13 A We have a lot of different portfolios -- Sorry? In what?

14 Q Of standards-essential patents?

15 A Yeah, we have several, sure.

16 Q And a number of them are essential for cellular telephone
17 communications?

18 A Yes.

19 Q So that means if I have a cell phone, and I want to make a
20 call on the cell phone, I have to use a cell standard, right?

21 A Yes.

22 Q But to be clear on this, the cellular portfolios were not
23 among the portfolios that Microsoft was offered a license to,
24 or wanted a license to?

25 A We have had discussions about them --

1 Q Let me --

2 THE COURT: Don't cut him off, counsel.

3 THE WITNESS: We have discussed licensing, and
4 Microsoft has had various -- because they have interest in
5 having a cellular device, is my understanding.

6 By Mr. Pritikin:

7 Q But to be clear, the 802.11 standard and the H.264
8 standard are different from the cellular standards?

9 A Yeah. Some patents overlap between WiFi and cellular. In
10 general, they are different portfolios.

11 Q And you testified yesterday that if a licensee uses four
12 or five portfolios, Motorola expects them to pay a royalty of
13 2.25 percent?

14 A If they use four or five portfolios?

15 Q Yes.

16 A Yeah. We have -- With the no stacking, that's correct.

17 Q And if a licensee uses just one portfolio, you still want
18 2.25 percent, right?

19 A In general, yes.

20 Q Now, if you are asking 2.25 percent for all of them, then
21 one by itself can't be worth 2.25 percent, can it?

22 A No. We believe that they are worth 2.25 percent when we
23 develop them, yes.

24 Q You talk about Motorola's no-stacking policy, and the
25 no-stacking policy takes into account the various Motorola

1 portfolios, right?

2 A That's correct, sure.

3 Q Meaning that you don't get another 2.25 percent for each
4 of them, right?

5 A That's correct, yes.

6 Q But it doesn't take into account the stacking of
7 Motorola's portfolio with those of other companies that have
8 patents that are essential to the standard, does it?

9 A Well, the 2.25 is set as a reasonable rate, but we don't
10 take into account what the other party is -- We do through
11 negotiations, it comes out, but not up front, that's correct.

12 THE COURT: Ladies and gentlemen, the counsel don't
13 know because it just came up recently. We got a note from
14 one of the jurors asking if we would define the terms
15 "hold-up" and "stacking." And since we have waded into this,
16 let me read you two definitions that came from a prior order
17 of the court.

18 "The payment of excessive royalties to many different
19 holders of standards-essential patents is referred to as
20 royalty stacking."

21 And in response to the second part of that, the question
22 of hold-up: "The ability of a holder of a
23 standards-essential patent to demand more than the value of
24 its patented technology, and to attempt to capture the value
25 of the standard itself is referred to as patent hold-up."

1 So with that -- We are all very familiar with these
2 terms. There was a question that came out with the jury this
3 morning, and I wanted to make sure, since we are into that
4 area, that we answered that question.

5 MR. PRITIKIN: Thank you, your Honor.

6 JUROR: I am having a hard time hearing you.

7 THE COURT: Did you hear what I just said or do you
8 need me to reread it?

9 JUROR: Just sometimes I can't hear you.

10 THE COURT: Then I will do it again. There was a
11 request for a definition. And the court has previously
12 found: "The ability of a holder of a standards-essential
13 patent to demand more than the value of its patented
14 technology, and to attempt to capture the value of the
15 standard itself is referred to as patent hold-up."

16 And, secondly: "The payment of excessive royalties to
17 many different holders of standards-essential patents is
18 referred to as royalty stacking."

19 When you see the final jury instructions, those terms are
20 also defined in there. You will have a copy of them when you
21 do your jury deliberations. Thank you.

22 Mr. Pritikin.

23 By Mr. Pritikin:

24 Q Mr. Dailey, in response to questions from Mr. Price you
25 testified about some licensing discussions with HTC. Do you

1 recall that?

2 A Yes.

3 Q And HTC makes cell phones?

4 A Smartphones, and I think they made tablets. I'm not sure
5 if they do. I think they do.

6 Q They are one of the largest makers of cell phones, aren't
7 they?

8 A They were at a point in time. I don't believe they are
9 now.

10 Q Were you personally involved in the license discussions
11 with HTC?

12 A I was, yes, in the 2011 timeframe.

13 Q So as a part of getting involved you familiarized yourself
14 with the background of prior licenses that Motorola had had
15 with HTC, correct?

16 A At a high level, sure.

17 Q And so, therefore, you are aware that HTC had previously
18 taken a license to a portfolio of cellular
19 standards-essential patents in 2003?

20 A That's correct, yes.

21 Q And that agreement did not involve 802.11 or H.264, did
22 it?

23 A Right. That was the reason we re-engaged with them in
24 2009.

25 Q So you came back in 2009, and this time you offered a

1 license to your 802.11 portfolio at 2.25 percent; is that
2 right?

3 A Yes.

4 Q And the reason you were doing that is you wanted to
5 pressure HTC into renewing the cellular license, correct?

6 A No. The cellular license is still in effect.

7 Q Well, it wasn't in effect then, was it?

8 A I think it is in effect today, yes. We still receive
9 payments on it.

10 Q Motorola did not actually enter into an agreement with HTC
11 for Motorola's 802.11 patents at a rate of 2.25 percent, did
12 you?

13 A No, we haven't completed those negotiations yet.

14 Q Well, they haven't agreed to pay you 2.25 percent for your
15 802.11; isn't that a fact, sir?

16 A Yes.

17 Q Now, after the presentation that was delivered on
18 September 24th of 2009, you made a change in what you were
19 offering to HTC, didn't you?

20 A Yes.

21 Q And let's take a look at Exhibit 3162. Can we put that
22 up? This is a presentation that was given to HTC in February
23 of 2011.

24 A Yes.

25 Q Would you turn, please, to Page 6?

1 THE COURT: Counsel, has this been admitted?

2 MR. PRICE: Yes. I think I just moved it into
3 evidence, your Honor.

4 MR. PRITIKIN: I think it is in evidence.

5 THE COURT: Thank you.

6 By Mr. Pritikin:

7 Q And on Page 6, at this time you were talking about all of
8 the different standards that you had essential patents for,
9 right?

10 A Essential and nonessential, yes.

11 Q And some of these -- CDMA is cellular, right?

12 A Yes.

13 Q GSM is cellular?

14 A Yes.

15 Q 3GPP is cellular?

16 A Yes.

17 Q And I think you told us you had a very strong portfolio on
18 cellular, right?

19 A A strong portfolio. I don't remember "very."

20 Q Let's turn to Page 8. The rate that you were offering for
21 a license to all of these portfolios that we looked at on
22 Page 6 was 2.25 percent, right?

23 A Yes.

24 Q So somewhere between 2009 and 2011 Motorola had thrown in
25 another dozen standards-essential patents for the

1 2.25 percent royalty?

2 A You have to understand, when you expand the scope of a
3 license it is in a bilateral fashion. So we increased the
4 scope of the license from a narrower license to a broader
5 license, but it was bilateral. So Motorola was to receive a
6 broader license from HTC and grant a broader license to
7 Motorola. So it is bilateral in nature. You're accurate,
8 there is more on the table.

9 Q The bottom line is, they wouldn't take a license at
10 2.25 percent for 802.11 by itself, and you came back and
11 said, here are our strong cellular patents, here are eleven
12 portfolios of patents, and we want 2.25 percent for that?
13 That was the state of play, wasn't it, sir?

14 A You are reading -- I'm not sure what HTC thought or
15 whether they would enter into it. We didn't conclude a
16 license with them on the additional technologies. They
17 already have a license in place today on some of the cellular
18 standards, and we were looking to have a broader agreement
19 with HTC.

20 Q I want to return to the subject of Marvell. I think you
21 were asked a few questions by Mr. Price about that. Can we
22 pull up Exhibit 16? I think it is in the notebook, or I
23 handed up a copy. Do you still have it, Mr. Dailey? If not,
24 I can give you one.

25 A Jennifer Ochs? Yeah, I have one.

1 Q Just to remind everybody -- This is the draft of the
2 proposed license that was sent to Marvell by Motorola; is
3 that correct?

4 A That's correct, yes.

5 Q Now, you didn't dispute the fact that Microsoft was carved
6 out of this and wouldn't get any chips sold -- Microsoft
7 wouldn't have the benefit of the license; isn't that correct?

8 A They were listed as a repudiated party.

9 Q That meant that they were carved out, right?

10 A Yes.

11 Q And you said the reason they were carved out is there was
12 a defensive suspension clause. I think you said that in
13 response to questions from Mr. Price. Do you recall that
14 testimony?

15 A Yes.

16 Q And a defensive suspension clause is one that allows you
17 to end an agreement or not license someone if they sued you,
18 is that your understanding of it, at a high level?

19 A At a very high level. Defensive suspension protects you
20 so you can have a discussion with the customer of a component
21 supplier about patents instead of directly through the
22 component supplier, that's correct.

23 Q Now, the truth of the matter is, Mr. Dailey, is it not,
24 that the reason Microsoft is carved out of this agreement was
25 not because of a defensive suspension provision? I can help

1 you with that. Let's look at Paragraph 3.5. Let's look at
2 page -- Annex C first. That might be helpful. This is the
3 list of repudiating parties. Do you see that? Let's put
4 that up.

5 A Yes.

6 Q And you see that Microsoft Corporation is listed as a
7 repudiating party?

8 A Yes, along with Apple and Gemalto, that's correct.

9 Q Let's turn back to Section 3.5. This is the section you
10 talked about yesterday that talks about repudiating parties,
11 isn't it?

12 A Yes.

13 Q And repudiating parties are defined in this paragraph,
14 right?

15 A They are, yes.

16 Q And those are the parties that are not going to get the
17 benefit of a license to Marvell, correct?

18 A That's correct.

19 Q Let's see what it says. Let's pull out this language. It
20 says, "The grants and covenant under Section 3 shall not
21 apply or extend in any way to any third party, including,
22 without limitation, Marvell customers that have asserted
23 properties against MMI or its affiliates or have otherwise
24 declined, repudiated or failed to accept an offer from MMI to
25 license MMI's essential properties on reasonable and

1 non-discriminatory terms and conditions, each a repudiating
2 party."

3 And Microsoft, in your view, fit into the category of a
4 company that had declined, repudiated or failed to accept an
5 offer from MMI, right?

6 A I don't know if I testified to that.

7 Q Well, I am asking you that question now, not what you
8 testified to yesterday. Microsoft, in your view, fell into
9 the category of a company that had declined, repudiated or
10 failed to accept an offer from MMI to license MMI's essential
11 properties on reasonable and non-discriminatory terms and
12 conditions, right?

13 A No, I don't -- The reason they are on the list -- I
14 didn't put this draft together, although I did approve it, as
15 you pointed out yesterday. I'm not sure they fell under the
16 asserted properties, because they have asserted properties
17 against MMI, or whether it fell under those terms. But it
18 was one of those two. Because "asserted" refers to
19 litigation and "properties" refers to patents, in general.

20 Q Now, by November of 2011, when this proposal was sent,
21 Microsoft had said publicly or had said to the court that it
22 was ready, willing and able to take a license on RAND terms,
23 had it not, sir?

24 A I'm sorry. I don't know the date in which you said that
25 or when you said that.

1 Q Now, let me return to HTC for just a second for
2 clarification. The license HTC took was a license on phones,
3 right?

4 A HTC is a manufacturer -- Yeah, phones and tablets, I
5 think.

6 Q That's what they pay a license on, is phones?

7 A Yes.

8 Q Now, in 2012, Mr. Dailey, when you were still conducting
9 the negotiations with Microsoft, still pursuing the
10 injunctions on standards-essential patents, it is true, is it
11 not, that you were aware that the Federal Trade Commission
12 was investigating Motorola --

13 MR. PRICE: Objection, your Honor. This is improper.
14 403.

15 MR. PRITIKIN: Can we see you at sidebar, your Honor?

16 THE COURT: One moment, counsel. Ladies and
17 gentlemen, I am going to let you go on your break early, as
18 opposed to having you sit through one more sidebar, and then
19 get one more minute of question and answer in and then send
20 you in on your break. We will see if we can make this more
21 comfortable for you. I haven't read you your admonition for
22 almost 12 hours, but since there is nothing you can do back
23 there other than talk about yourselves, don't do that. We
24 will see you back out here at 10:45. Please rise for the
25 jury.

1 (At this time the jury left the courtroom.)

2 MR. PALUMBO: Your Honor, I must have been asleep
3 this morning, because I neglected to introduce Cheryl Berry,
4 who is also with us.

5 THE COURT: Thank you.

6 MR. PRITIKIN: May I explain?

7 THE COURT: Yes. Where is this going?

8 MR. PRITIKIN: Your Honor, they have chosen to inject
9 into this case the subjective good faith of Motorola, and in
10 particular through the testimony of Mr. Dailey his personal
11 good faith. And we think that a lot of this is going to be
12 very confusing to the jury, because there are many other
13 grounds on which you can find a breach of the RAND
14 commitment. But it was their choice to put up Mr. Dailey to
15 say that he had a pure heart. In point of fact, what we know
16 is that in 2012 when they were seeking these injunctions, the
17 Federal Trade Commission had opened an investigation into the
18 abuse of standards-essential patents by Google and by
19 Motorola, and in particular it covered the subject of their
20 conduct toward Microsoft. And we know that it culminated in
21 an order that was entered, I believe it was in January
22 of 2013, which is the time when they conveniently dropped the
23 two standards-essential patents from the ITC case, just
24 within days of that order being entered.

25 Now, why is this relevant? Had they not put Mr. Dailey up

1 to get into this subject of his pure heart, maybe it would be
2 and maybe it wouldn't be. We think there is still a strong
3 argument that this explains the context of what is happening
4 here and why these patents are being dropped at the time they
5 are dropped. But having put Mr. Dailey up and listened to
6 him for an hour or two yesterday talking about what his
7 intent was - what his motivations were, what his personal
8 knowledge was, I didn't know this, I didn't know that - I
9 think we are entitled to bring out that one of the things
10 that is overlaying all of this is the fact that in 2012 the
11 company is clearly on notice that there are issues, serious
12 issues, concerning the way that they are approaching their
13 standards-essential patents vis-a-vis Microsoft.

14 THE COURT: What was the outcome of the FTC
15 proceeding?

16 MR. PRITIKIN: There was an order that was entered,
17 and there are comments, there are a number of documents that
18 are in -- I believe they are dated in January of 2013. But
19 the upshot of it was they agreed that they were no longer
20 going to seek injunctions on standards-essential patents.
21 There is a complicated procedure in there where they can go
22 to a third party - an arbitrator, a court - and have that, as
23 you did, adjudicate what RAND royalty is, and sort of took
24 our proceedings, I think, as sort of the template for that.
25 But that was the consent order that was entered. And that

1 governed their future conduct. The order, as it was
2 originally entered, there may have been some ambiguity in it.
3 We think that it required that they drop their
4 standards-essential patents at that time that were being
5 asserted, at least for injunctions, against Microsoft. In
6 the final order that was issued there was a clarification of
7 that. I'm not clear that it would cover the pending actions,
8 although at that point they had already dismissed the
9 injunctions in the ITC against Microsoft. But that's what
10 happened.

11 Since they want to talk about what they knew and what they
12 believed, and what they had reason to know and not know, I
13 think those things become very important.

14 THE COURT: Mr. Cannon, now you get your chance.

15 MR. PRICE: May I ask leave. I know you wanted one
16 attorney to argue. I know nothing about the FTC proceedings.
17 That's why Mr. Cannon stood up. I do know what Mr. Dailey
18 testified to in this case.

19 THE COURT: We get one lawyer, counsel.

20 MR. PRICE: That's why I asked leave.

21 THE COURT: Mr. Cannon.

22 MR. CANNON: Your Honor, as a threshold matter,
23 Mr. Dailey gave no testimony in connection with the assertion
24 of injunctions or seeking that sort of relief. His good
25 faith was the offers and the licensing proposals.

1 With respect to the FTC, we do have a bench memo at the
2 conclusion of my argument I would like to hand up and give a
3 copy to the other side. I think Microsoft has
4 mischaracterized the FTC proceedings. The FTC began an
5 investigation after 2010, well after the offer letter and
6 this lawsuit began. That was very recently settled. So it
7 is an administrative investigation that was settled. In the
8 settlement Motorola and Google admitted no liability
9 whatsoever. That was an agreed-upon settlement. We are
10 happy to provide those documents to the court. There is case
11 law that -- on Rule 408 that administrative investigations
12 and settlements are not evidence and should not come into the
13 trial. In addition, it is an entirely satellite litigation,
14 and we think it would confuse the jury, because then we would
15 have to explain what happened at the FTC. It is a pretty
16 complicated process. The bottom line is, though, Motorola
17 did not have to withdraw any injunctions in pending cases.
18 In addition, Motorola and Google admitted in the settlement
19 to no liability whatsoever. So it is complex, it's true.
20 But the bottom line is, it is a full settlement, under 408 it
21 should not come in, and it is extremely complex. I think it
22 would take an extremely long time to lay out. I think it is
23 kind of a surprising end to the testimony, to get it in this
24 fashion.

25 THE COURT: How long is the FTC consent degree?

1 MR. CANNON: There is two. There is one that is very
2 recent that is the final settlement, and then there was a
3 preliminary settlement. I don't have them with me right this
4 moment, but the final one -- It is an order of 25 pages.

5 THE COURT: I am not comfortable trying to rule on
6 this without seeing what is in it.

7 MR. PRITIKIN: I understand, your Honor. Let me make
8 this suggestion: Let me provide you -- I have copies of the
9 statement of the FTC that describes it and the two consent
10 orders. If your Honor would prefer, we would be happy to
11 give you a bench memo first thing tomorrow morning in
12 response. There are other ways this can be presented to the
13 jury.

14 THE COURT: That's how we are going to proceed. I
15 would like to see your bench memo; I would like to see your
16 bench memo. I will not permit the question at this time.
17 Mr. Dailey is the client representative. He is here. We
18 need to recall him. But until I know what is in the FTC
19 order, I am just not prepared to rule on this area. It seems
20 to me, just to give you some of my current thinking,
21 Mr. Dailey has somewhat opened the door by saying: We never
22 would do anything that would violate good faith and fair
23 dealings; this is how we make negotiations proceed. I agree
24 he did not mention injunctions. I don't know what is in the
25 FTC order, if it encompasses the broader area or not. I feel

1 rather incapable of ruling on those matters at this time.
2 But let's get the bench memos in and then we will recall
3 Mr. Dailey to discuss the area, if I find it is appropriate.

4 MR. CANNON: Thanks, your Honor. We will distribute
5 the bench memos, and we will file also the latest FTC
6 document.

7 THE COURT: Counsel, let me give you two matters.
8 After we started this morning and brought the jury in, I got
9 the following note handed up. "While the trial is underway
10 may we ask for specific info to be presented, such as a
11 formal definition of stacking and hold-up?" Signed by Juror
12 Number 1. There is actually some very interesting academic
13 work on allowing jurors to ask questions, but I think it is
14 valuable for the lawyers to know this is an area that at
15 least one of the jurors has an interest in. Since I have
16 defined those two terms in the findings of fact and
17 conclusions of law, and while I haven't heard from you yet,
18 they are also defined in the final jury instructions, it
19 seemed to me that I could easily read those definitions. I
20 am not sure that is totally satisfactory to the jury, but all
21 I am going to do is alert you to the fact that is an area
22 that they will need some further guidance on. If you think
23 what the court said was sufficient, don't go any farther. If
24 you think it is appropriate and you can fit it into your
25 presentations, then you should. That is one item.

1 The second is, it is 44 minutes. That answers that
2 question. Mr. Harrigan.

3 MR. HARRIGAN: By the way, I think there is a
4 paragraph in your preliminary instruction that explains what
5 "hold-up" is.

6 THE COURT: Apparently there was a lot read at that
7 time.

8 MR. HARRIGAN: They may have forgotten it by now.

9 THE COURT: We will be in recess until 10:45. Thank
10 you, counsel.

11 (The proceedings recessed.)

12 THE COURT: Mr. Dailey, I think you're still up here.
13 Let's bring the jury in, please.

14 (The following occurred in the presence of the jury.)

15 THE COURT: Ladies and gentlemen, at the very end
16 before we went out for your morning break, there was a
17 question asked that requires me to do some further homework.
18 So you'll disregard that question and we may take it up
19 later. We need to do some further work before that.

20 Mr. Pritikin.

21 MR. PRITIKIN: I have nothing further at this time,
22 Your Honor.

23 MR. PRICE: A short redirect.

24 RE CROSS EXAMINATION

25 BY MR. PRICE:

1 Q Mr. Dailey, in your examination you told Mr. Pritikin --
2 he asked you about royalty stacking?

3 A Yes.

4 Q Using the definition the court gave the jury, which is
5 about other folks who declared patents essential coming
6 forward?

7 A Right.

8 Q He asked if you took that into account, and you said you
9 don't take it into account, not upfront but during
10 negotiations.

11 A Right.

12 Q What did you mean by that when you said it's taken into
13 account not upfront but during negotiations?

14 A So when we engage with a prospective licensee and have
15 discussions with them, from time to time they'll bring up
16 their ability to pay, or what's fair to pay. And we take
17 that into account. I recall one agreement that we negotiated
18 with TCL, a company called TCL&Alcatel brand. They're
19 getting larger. They're in China. And at the time they sold
20 a lot of low-margin phones that didn't have a lot of profit.
21 So they said, we can't pay you 2.25 today but we can work on
22 a ramped -- so we have a fairly complex agreement that has
23 low royalties starting off, and then year-on-year it builds.
24 So they said they could pay at a later point in time. And so
25 we took their ability to pay into account.

1 And I guess the only other thing is, there is a lot of
2 discussion about royalty stacking in a theoretical sense.
3 But, you know, in the mobile phone space, it's a very healthy
4 market, I mean, the concern is --

5 Q That's a little beyond my question. I'm just saying, when
6 you say that you take it up, to be taken up during
7 negotiations --

8 A Right.

9 Q -- what sort of topics would you expect, in this regard,
10 to be taken up in negotiations?

11 A So, people would raise that issue of royalty stacking and
12 their ability to pay and what they pay others for similar
13 technology and the value of the technology to their products
14 that they're using. That would all come out in negotiation.

15 Q In the negotiations you had with Mr. Gutierrez, did he
16 bring up royalty stacking, that is, others asking for the
17 same rates or greater rates?

18 A I don't recall any specific conversation on royalty
19 stacking.

20 Q You were also asked some questions about this draft
21 Marvell license agreement, that was Exhibit 16. And I want
22 to ask you, you were asked to look at paragraph 3.5?

23 A Yes.

24 Q If we could show that. And you remember you were asked
25 whether Microsoft was included as a repudiating party because

1 they had refused to an take essential license, as opposed to
2 having sued Motorola. Do you recall that?

3 A That's correct, yes.

4 Q If we could look at Exhibit 16, paragraph 3.5. So, if we
5 go to that first paragraph that says, "For clarity and
6 notwithstanding any provision in this agreement to the
7 contrary, the rights under this agreement, including without
8 limitation," et cetera, "shall not apply or extend in any way
9 to any third party, including, without limitation, Marvell
10 customers that have asserted properties against MMI or its
11 affiliates." You see that?

12 A Yes.

13 Q And MMI refers to?

14 A Motorola Mobility.

15 Q And you see that's in capital letters there, that thing,
16 "Asserted"?

17 A Yes.

18 Q What does it tell you when it's in capital letters?

19 A It means it's a defined term. So you have to go into
20 Section 1, and there's a listing of the definitions.

21 Q Let me put that up.

22 A It's 1.3.

23 Q If we could put up paragraph 1.3 which defines Asserted.
24 It says, "Assert, Asserted, or Assertion means to commence or
25 prosecute patent infringement litigation." So let me ask

1 you, sir, as of the date of this letter, or e-mail,
2 November 2001, had Microsoft commenced or prosecuted patent
3 infringement litigation against Motorola?

4 A Yes.

5 Q And if you go to the page that lists the parties that are
6 covered by that -- and by the way, is this a final agreement?

7 A No. This is an early draft.

8 Q So, for example, let's go -- Gemalto, had Motorola ever
9 gone to Gemalto and asked Gemalto to take licenses on
10 standards-essential patents and Gemalto said no?

11 A No. Gemalto had sued us.

12 Q They had commenced an action?

13 A Yes.

14 MR. PRICE: Nothing further.

15 THE COURT: Anything further, Mr. Pritikin?

16 REDIRECT EXAMINATION

17 BY MR. PRITIKIN:

18 Q Mr. Dailey, did you say that -- I thought I heard you say
19 you take stacking into account as you get into negotiations;
20 is that right?

21 THE COURT: Mr. Pritikin, can you turn and face the
22 microphone?

23 MR. PRITIKIN: Yes.

24 THE COURT: I'm the worst offender, I am told.

25 Q Mr. Dailey, did I hear you say that you take stacking into

1 account once you get into the negotiations?

2 A Yes.

3 Q And you don't take stacking into account in putting
4 forward the first offer; is that right?

5 A Well, we don't -- in the mobile space I haven't seen the
6 effects of it. I wouldn't know how to take it into account
7 upfront.

8 Q So that's a no?

9 A That's correct.

10 Q And is it correct that you did not consider stacking when
11 you made the initial offers to Microsoft?

12 A Not external stacking. Yes, that's correct.

13 MR. PRITIKIN: Nothing further, Your Honor.

14 MR. PRICE: Nothing further, Your Honor.

15 THE COURT: Mr. Dailey, congratulations.

16 THE WITNESS: Thank you.

17 THE COURT: Microsoft may call its next witness.

18 MR. HARRIGAN: Yes, Your Honor. We'll call Mr.

19 Garrett Glanz.

20 MR. WION: May I approach, Your Honor?

21 THE COURT: Yes.

22 GARRETT GLANZ

23 Having been sworn under oath, testified as follows:

24 THE CLERK: Will you state your name for the record,
25 please.

1 THE WITNESS: My name is Garrett Glanz.

2 THE COURT: You may proceed.

3 DIRECT EXAMINATION

4 BY MR. HARRIGAN:

5 Q Mr. Glanz, would you be so kind to give the jury a brief
6 description of your current position, educational background,
7 and the history of your employment at Microsoft?

8 A Sure. I have an undergraduate degree in English from
9 Dartmouth College and a master's degree in business from the
10 University of Chicago. I joined Microsoft in September of
11 2000, and I've held various business-development and
12 licensing roles since then. My current role is as general
13 manager of licensing within the intellectual property group.

14 Q And so that's licensing of what, currently?

15 A That's the licensing of Microsoft's patent portfolio.

16 Q The whole thing?

17 A Correct.

18 Q Okay. During the course of your career have you had
19 exposure to and involvement in something called patent pools?

20 A Yes, I have.

21 Q Specifically, were you involved in the formation of a
22 patent pool related to the H.264 standard?

23 A Yes.

24 Q What one or ones?

25 A There were two pools that were in formation for the H.264

1 video standard. One facilitated by MPEG LA and one
2 facilitated by Via Licensing.

3 Q When you say MPEG LA, what is MPEG LA?

4 A MPEG LA is a licensing company that forms patent pools for
5 the purpose of offering joint patent licenses to the
6 marketplace.

7 Q Please explain -- using MPEG LA as a specific example,
8 will you tell the jury what a patent pool is and what it
9 does?

10 A A patent pool is basically formed when a group of
11 companies get together and discuss, and ultimately agree on,
12 the terms of a joint patent license, a license that would
13 include all of the patents related to a particular technology
14 owned by those companies. And the purpose of that is to
15 provide a one-stop shop for companies that want to implement
16 that technology. It's for convenience of both the licensees,
17 but also convenient for the licensors, because the
18 patent-pool administrator handles all of the licensing
19 discussions as well as the collection of royalties.

20 Q So the people who form the pool are the companies that
21 have patents, standards-essential patents that are part of
22 the standard?

23 A That's correct. In order to participate in the
24 discussions and ultimately in the pool, you must have at
25 least one essential patent for that particular technology.

1 Q So -- and then you used the terms "licensors and
2 licensees," which is very accurate, but can we call them
3 patent holders on one side -- those are the licensors, right?

4 A Correct.

5 Q Then the companies that would be potentially using the
6 H.264 standard could come to the pool and do what?

7 A Could request a license and sign the license agreement,
8 then begin to pay royalties for their use of those patents.

9 Q Okay. And if they signed one license with the pool and
10 agreed to pay the pool royalty, what would they get a license
11 to?

12 A They would get a license to the patents from all the
13 companies that were participating in the pool.

14 Q So they'd have that entire portion of the standard
15 covered?

16 A Correct. It could be several hundred, if not thousands,
17 of patents in one license.

18 Q Okay. When was the MPEG LA patent pool in the process of
19 formation?

20 A The formation process started in mid-2003 and extended
21 through mid-2004.

22 Q About how many patent-holding companies were involved in
23 those discussions?

24 A I recall there were roughly 20 companies involved at that
25 time.

1 Q So, another thing about how the pool works that might be
2 good to establish at this point is when a licensee -- the
3 company that wants to use the standard -- gets a license to
4 the pool and starts paying royalties, how does the pool
5 divide the royalties up among all the companies that own
6 patents that are in it?

7 A Sure. Typically the royalties are divided on a per-patent
8 basis. So, for example, if there are one hundred patents in
9 the pool and Company A holds five of those patents, Company A
10 would get roughly five percent of the total royalty revenue
11 generated by the pool.

12 Q Okay. So now we just covered -- there were about 20
13 companies, and the work to form the pool was going on in '03
14 to '04. Could you describe how the pool administrator, MPEG
15 LA, went about trying to get a consensus on what the pool
16 royalty should be. What was the process?

17 A The process was typically that MPEG LA would start the
18 discussions by presenting what they would call a strawman
19 proposal, which was basically a set of terms that were used
20 to then elicit a reaction from the patent-holding companies
21 to get their feedback, and then over time to make adjustments
22 to the proposal, ultimately with the goal of reaching
23 consensus in the group on a set of terms.

24 Q Did MPEG LA reach consensus, eventually?

25 A Yes.

1 Q Who were some of the companies, or what were some of the
2 companies that participated in the pool formation for H.264?

3 A Participants included companies such as Sony, Panasonic,
4 Sharp, Nokia, IBM, and, of course, Microsoft and Motorola.

5 Q Okay. Did Microsoft and Motorola both have patents that
6 were part of the H.264 standard?

7 A Yes.

8 Q And in this instance is it also true that they both had
9 products that might, at some point, use H.264?

10 A That's correct. In the case of Motorola, they made cell
11 phones which could play back video content; and Microsoft,
12 for example, had Windows which was capable of playing back
13 video content, as well as products like Xbox that could play
14 back video.

15 Q And in this instance did both Motorola and Microsoft also
16 participate in the actual creation of the H.264 standard?

17 A Yes. Both companies were active participants in the
18 standards-setting organizations.

19 Q So you said the way the royalty was arrived at eventually
20 was through a series of -- discussing a strawmen or a
21 strawman. Was there a meeting for this purpose on July 31st
22 to August 1st '03?

23 A Yes.

24 Q And were you there?

25 A Yes, I was.

1 Q Was Motorola represented there?

2 A Yes, Motorola was represented by Paul Bawel.

3 Q On July 31st did the administrator put forward a strawman?

4 A Yes. MPEG LA put forth an initial strawman to start the
5 discussion.

6 Q You've got Exhibit 1581 in your binder, I think?

7 A That's right.

8 Q Can you identify Exhibit 1581? Generally what is it?

9 A Yes. This is the slide presentation that MPEG LA made to
10 the group of patent holders at that meeting.

11 Q So these are the actual slides that everybody looked at
12 when they were discussing the strawman?

13 A Yes.

14 MR. HARRIGAN: We'll offer 1581.

15 MR. CANNON: No objection.

16 THE COURT: 1581 is admitted.

17 (Exhibit No. 1581 was admitted into evidence.)

18 Q I'd like you to take a look at an excerpt from 1581, which
19 is page 15 of the presentation. Basically you can't really
20 see this whole page because the callout covers part of it up.
21 So what are we looking at here?

22 A This is a slide from the presentation outlining the
23 initial strawman proposal from MPEG LA.

24 Q And I think the jury has already heard this a few times,
25 but this is talking about encoders, decoders, and codecs.

1 Would you briefly remind us all what a codec is?

2 A Codec stands for compression, decompression, and it's
3 basically a technology for shrinking the size of a video file
4 so that it's easier to deliver it over the internet, or on a
5 DVD, to a device that's then capable of playing back the
6 video content.

7 Q So if Windows had H.264 in it, one operating system would
8 have one codec?

9 A Correct.

10 Q What was the lowest rate -- now we can do the callouts, if
11 you don't mind.

12 What was the lowest rate that was in this proposal per
13 unit, per codec?

14 A The lowest rate in this proposal was \$0.20 per consumer
15 codec.

16 Q In terms of the strawman, that would be for all the
17 patents owned by all the companies in the pool, right?

18 A That's correct.

19 Q And is that the rate that would be paid -- is that the
20 rate that would actually be paid, or is it blended between
21 some higher rates for lower volume? And explain that, if you
22 would.

23 A In this proposal there were three different rate tiers
24 depending on the annual volume of products shipped by the
25 licensee. So it starts at \$1.50 per codec for the first 10

1 million units. It then goes down to \$1 per codec for the
2 next 10 million units. And then after 20 million units, on
3 an annual basis, the price per codec would go down to \$0.20.

4 Q Okay. So for high-volume users like Motorola and
5 Microsoft, how would the rate be calculated?

6 A The rate, as you said before, was blended. And it would
7 be basically just a count of the units shipped in the year
8 against these different tiers.

9 Q And as soon as you got up to the high-volume level, you'd
10 start paying \$0.20?

11 A Correct.

12 Q Who was Motorola's representative at this meeting?

13 A Paul Bawel.

14 Q Did Mr. Bawel express Motorola's view with regard to the
15 rates set forth in this strawman?

16 A Yes, he did.

17 Q Is there a written record of what he said?

18 A Yes. I took detailed notes of the proceedings and
19 specifically what each company said in response to the
20 different proposals.

21 Q Okay. In your binder the next exhibit is 1139. Can you
22 identify that?

23 A Yes. This is a copy of my notes from those meetings.

24 Q Okay. And we have a callout on this --

25 MR. HARRIGAN: We'll offer 1139.

1 MR. CANNON: No objection.

2 THE COURT: 1139 is admitted.

3 (Exhibit No. 1139 was admitted into evidence.)

4 Q Now, we have -- is this the first page of your notes that
5 we're looking at here on the screen?

6 A It is.

7 Q Could we look at the page that has Mr. Bawel's -- notes on
8 Mr. Bawel's comments, please, which is 04 and 05. Okay. So
9 is this your note with regard to what Mr. Bawel had to say
10 about the strawman?

11 A Yes, it is.

12 Q Did you take similar notes about what the comments of all
13 the other companies were?

14 A I did.

15 Q So looking at your note, I see it starts out, it says,
16 "Likes grace period. May need to be even longer." I don't
17 think we need to talk about that. Then he says, "Wants
18 minimal threshold. No projections for mobile. 50 percent of
19 phones with video in 2010. Too expensive for mobile and will
20 lead to alternatives. Encoder projections seem to outscale
21 decoding."

22 Having read that, will you tell the jury what Mr. Bawel
23 said in more expansive terms?

24 A Sure. Mr. Bawel obviously had a quite of bit of feedback
25 on the proposal. I think the main points of that feedback

1 were the fact that, as he said, the proposed rates would be
2 too expensive for mobile products. And companies that
3 develop mobile products, such as Motorola, would likely turn
4 to alternative video-coding technologies if this proposal
5 were to be brought forward.

6 He also expressed strong support, actually, for having
7 capped annual royalties. And the reason that that was
8 written and circled in my notes is because that was also a
9 position that Microsoft supported. And so when companies
10 showed similar support, I took specific notes related to that
11 point.

12 Q Okay. So, Mr. Bawel had basically, regarding the
13 royalties, two comments. One had to do with the actual
14 per-unit rate of \$0.20 being too high?

15 A Correct.

16 Q Okay. And then how do you know that he wanted caps? How
17 is that reflected in your notes?

18 A By the word "cap" with a circle around it. That appears
19 throughout my notes, every time any company expressed support
20 for the cap concept.

21 Q So Mr. Bawel said, even at \$0.20, we need annual caps?

22 A Correct.

23 Q And that \$0.20 would be for all the patents owned by all
24 the companies participating in the pool?

25 A That's right.

1 Q Did you participate in meetings of another outfit that was
2 also trying to put together an H.264 patent pool during this
3 timeframe?

4 A Yes, I did. Via Licensing was also in the process of
5 trying to form a pool for H.264.

6 Q Did Mr. Bawel attend those meetings also?

7 A Yes, he did.

8 Q Did you take notes there, too?

9 A I did.

10 Q Can you identify Exhibit 1583 in your book?

11 A Yes. These are notes I took at the Via Licensing meeting
12 for H.264 on August 5, 2003.

13 Q Okay.

14 MR. HARRIGAN: We'll offer 1583.

15 MR. CANNON: No objection.

16 THE COURT: It is admitted and may be published.

17 (Exhibit No. 1583 was admitted into evidence.)

18 Q Is this page, which is the lawyer-No. 627, your note on
19 Mr. Bawel's comments at the Via Licensing meeting?

20 A Yes, it is.

21 Q And what did he say?

22 A Mr. Bawel made a proposal to the group for a set of terms
23 that Motorola could support. And that included codec
24 royalties of \$0.25 per unit with annual caps of \$2 million
25 per year.

1 Q So how did this -- from the standpoint of a mobile
2 manufacturer with high volume, or Microsoft with high volume
3 for H.264 technology, how did this proposal compare to the
4 one that we just discussed, that was discussed at MPEG LA?

5 A This proposal was significantly less expensive for a
6 high-volume producer, because of the annual cap set at
7 \$2 million per year.

8 Q So even though the unit rate was \$0.05 more, the effective
9 rate for a large-volume user would be --

10 A Much, much less, yes.

11 Q So let's turn back to the MPEG LA discussions for a
12 minute. When did the participants in MPEG LA actually reach
13 a consensus on the ultimate royalty that they would charge
14 per codec to anyone who came to the pool for a license?

15 A Consensus was reached in November of 2003.

16 Q Was there a press release that was issued by MPEG LA to
17 lay out the rates?

18 A Yes.

19 Q Can you look at Exhibit 1584? What is that?

20 A This is the press release that MPEG LA made on
21 November 17, 2003, announcing terms of the H.264 license as
22 determined by the patent pool, as well as the names of the
23 companies that were supporting those rates and this release.

24 Q Okay.

25 MR. HARRIGAN: We will offer 1584.

1 MR. CANNON: No objection.

2 THE COURT: It's admitted. It may be published.

3 (Exhibit No. 1584 was admitted into evidence.)

4 Q Looking at Exhibit 1584, and specifically page 107, what
5 were the rate royalties for codec that were decided?

6 A I think it's actually the next page.

7 Q Page 2.

8 A So the rates that were announced at the time for codecs
9 started at \$0.20 per unit, and went down to \$0.10 per unit
10 after the first 5 million units shipped in any given year.

11 Q And how about between zero and 100,000 units, what was the
12 rate?

13 A The rate was zero, so there was a sort of free threshold.

14 Q Was there also a cap?

15 A Yes. There were caps on those rates. The caps started at
16 \$3.5 million in 2005 and 2006, and went up to \$5 million per
17 year in 2009 and 2010.

18 Q So for a company like Microsoft or Motorola, was the
19 effective rate \$0.10 for all the patents in the pool, or less
20 than that?

21 A No, it was likely less. Because both companies, at the
22 volumes they were shipping, would have hit the cap and
23 therefore benefited from that.

24 Q Okay. So you said that this was a consensus rate. Was
25 there also -- well, strike that for a second.

1 Looking down at the lower portion of this exhibit -- I
2 guess it's on a different screen. Did Motorola join in the
3 press release?

4 A Yes. There's a list of companies in the release that
5 includes Motorola, as well as Microsoft.

6 Q Okay. So this is the section of the release that
7 indicates who joined in it?

8 A Correct.

9 Q And we can see Motorola is there. Could you identify
10 Exhibit 1179 in your book, which should be the next one?

11 A Yes. This is an exhibit that includes an e-mail exchange
12 that was sent to what was called the ABC Group, which was
13 basically the Listserv that included all of the companies
14 participating in the patent pool. And it's primarily between
15 Mr. Bawel at Motorola and Larry Horn at MPEG LA, discussing
16 some details in the press release. And ultimately giving
17 Motorola's approval and expressing support for the press
18 release.

19 MR. HARRIGAN: Offer 1179.

20 MR. CANNON: No objection.

21 THE COURT: It's admitted and may be published.

22 (Exhibit No. 1179 was admitted into evidence.)

23 Q And right up there at the top it says, "Okay. Motorola
24 agrees to the terms of the press release." Right?

25 A Correct.

1 Q Okay. Were final per-codec rates or royalties agreed to?
2 In other words, this is the consensus in November; was there
3 a final agreement?

4 A There was a final agreement, but these rates did not
5 change between November and when the license became available
6 in late June.

7 Q Okay. And was there another press release issued in May
8 of '04 when the final rates were decided upon?

9 A Yes.

10 Q And I think you said per-codec rates were the same?

11 A That's correct.

12 Q Did Motorola join in that press release also?

13 A Yes, it did.

14 Q During these meetings of MPEG LA, did Mr. Bawel ever
15 contend that Motorola's patents were more valuable than the
16 other patents in H.264?

17 A No, he never did.

18 Q Did he ever object to the system of distributing royalties
19 on a per-patent basis?

20 MR. CANNON: Objection, leading.

21 THE COURT: Sustained.

22 Q Did Mr. Bawel ever say anything about the system of
23 distributing royalties on a per-patent basis?

24 A Not that I recall.

25 THE COURT: If there's going to be an objection, you

1 need to allow the objection to be made. Counsel, do you want
2 to make your objection?

3 MR. CANNON: Objection, leading, Your Honor.

4 THE COURT: Overruled.

5 A Not that I recall.

6 Q So did there come a time, sometime after May of '04, when
7 the second press release was issued, when the formal
8 agreement/contract was signed among all of those who were
9 participating in the patent pool?

10 A Yes. Most of the companies signed the agreement in the
11 late June or early July timeframe.

12 Q And did Motorola sign?

13 A No.

14 Q Had you received any forewarning of this?

15 A No.

16 Q So ultimately Motorola did not agree to be bound by the
17 pool rates?

18 A That's correct.

19 THE COURT: Mr. Harrigan, foundation matters, yes;
20 factual issues, no.

21 Q So what was your understanding of the effect of Motorola
22 not signing the contract?

23 A The effect was that Motorola's patents were not available
24 through the joint license.

25 Q Did that trouble you?

1 A We would have preferred --

2 MR. CANNON: Objection, relevance.

3 THE COURT: Overruled.

4 A We would have preferred them participating because it
5 would have added additional value to the license. But
6 because we knew Motorola was obligated to provide a RAND
7 license to the marketplace, it didn't trouble us.

8 Q Okay. Were you aware of Motorola's letter, written in
9 October of 2010, relating to its H.264 standards-essential
10 patents, when it came in?

11 A Yes. I saw a copy of that letter.

12 Q At any time during the MPEG LA discussion of royalties,
13 did Motorola mention potential rates in the range of \$11 per
14 codec?

15 A No, nothing remotely close to that was ever mentioned.

16 Q Did Microsoft contribute its patents to the MPEG LA pool?

17 A Yes.

18 Q And so for Microsoft's patents, since the pool was formed,
19 how has Microsoft been compensated?

20 A Microsoft receives a share of the overall pool royalties
21 as determined by the ratio of our patents to the total number
22 available in the pool.

23 Q Okay. So, if Motorola wanted a license to Microsoft's
24 H.264 patents, how could it get one?

25 A It could go to MPEG LA and sign the joint-patent license.

1 Q And that would be for all the patents, not just the
2 Microsoft patents?

3 A Correct.

4 Q Okay.

5 MR. HARRIGAN: No further questions.

6 THE COURT: Mr. Cannon.

7 CROSS EXAMINATION

8 BY MR. CANNON:

9 Q Good morning.

10 A Good morning.

11 Q You mentioned, I believe, if I heard correctly, that
12 Microsoft was not troubled by Motorola dropping out of the
13 patent pool because Motorola had RAND obligations; is that
14 correct?

15 A That's correct.

16 Q You understand, don't you, that Motorola cannot force
17 Microsoft to pay more than RAND?

18 A I think that's right.

19 Q And I know you explained patent pools to the jury, but I
20 just want to make sure that we get this point. You would
21 agree that participation in patent pools is voluntary; is
22 that right?

23 A Correct.

24 Q No one forces anyone to be in a patent pool?

25 A That's right.

1 Q So Microsoft was not obligated to join?

2 A No.

3 Q Nor was Motorola?

4 A That's correct.

5 Q And either Microsoft or Motorola could have dropped out of
6 the patent pool, correct?

7 A That's correct.

8 Q Would it be fair to characterize a patent pool as a group
9 of companies coming together and pooling their patents so
10 that each of them gets a license to that collection of
11 patents?

12 A Typically the patent holders that join the pool also
13 become licensees of that pool as well.

14 Q And there may be business reasons for that, correct?

15 A Correct.

16 Q Each company that joins the pool presumably has a business
17 reason to join the pool?

18 A That's right.

19 Q And we've heard, in this trial, a lot about standards
20 organizations. And you would agree that a standards-setting
21 organization is something different from a patent pool,
22 correct?

23 A Correct.

24 Q And some of the standards organizations we've been hearing
25 about, like the IEEE and the ITU, those organizations are not

1 directly affiliated with MPEG LA, for instance; is that
2 right?

3 A That's right.

4 Q And would you agree in standards setting, companies come
5 together and actually share their technology, some of which
6 may be patented, some of which is not; is that right?

7 A That's correct.

8 Q So an actual technical standard is developed as part of
9 the standards-setting body?

10 A That's right.

11 Q Whereas a patent pool is more of a business arrangement
12 where the patents are brought together and a license is
13 actually created by the pool?

14 A Correct.

15 Q Now, we looked at some of the notes that you took from, I
16 believe it was 2003; do you remember that?

17 A Yes.

18 Q And those reflected various inputs from various companies
19 during the meeting, two meetings in 2003, correct?

20 A Correct.

21 Q Would it be fair to characterize those notes as
22 reflecting, essentially, negotiations within the patent pool?

23 A Yes, it was a group negotiation.

24 Q That's because a pool is a business arrangement between
25 various companies, correct?

1 A Correct.

2 Q And it's accurate, isn't it, that Microsoft had a business
3 reason for participating in the pool in 2003, right?

4 A Yes, we did.

5 Q And you mentioned another pool run by Via. Do you
6 remember that?

7 A Yes.

8 Q Now, Microsoft was part of the Via negotiations, correct?

9 A Yes.

10 Q But then ultimately dropped out?

11 A Yes.

12 Q And Microsoft probably had a business reason for dropping
13 out, correct?

14 A Yes. We decided to work with the MPEG LA pool.

15 Q Fair to say that Microsoft was active in negotiating the
16 licensing structure of MPEG LA?

17 A Yes.

18 Q Microsoft sells the Windows operating system, correct?

19 A Correct.

20 Q And as part of the MPEG LA negotiations in 2003, fair to
21 say that Microsoft wanted the H.264 license when Microsoft
22 got coverage for its OEMs that incorporate Windows?

23 A That's correct.

24 THE COURT: You might want to explain what OEM is.

25 MR. CANNON: My next question, Your Honor.

1 Q Perhaps you could explain what an OEM is.

2 A That stands for original equipment manufacturer. In the
3 case of Windows, our OEMs would be companies like Dell,
4 Lenovo, HP, they build the actual PCs on which Windows runs.

5 Q And that's an important part of Microsoft's business,
6 correct?

7 A Correct.

8 Q So Microsoft had that in mind when it negotiated the rates
9 in MPEG LA?

10 A Yes.

11 Q Is it also true that Microsoft negotiated separate caps
12 for PC operating systems that used H.264?

13 A That's correct.

14 Q And I think we've heard this phrase, but perhaps you could
15 explain to the jury what a "cap" is?

16 A A cap is a maximum amount of money that a company would be
17 required to pay in a given period of time, regardless of what
18 their volumes shipped were in that time.

19 Q Is it fair to say that your group considered getting the
20 particular license structure that resulted in the pool, you
21 considered that a win, didn't you?

22 A We thought it was important that Microsoft could pay the
23 royalties for Windows devices, yes.

24 Q Now, you mentioned that Motorola participated in some of
25 the negotiations in 2003, correct?

1 A Correct.

2 Q And presumably Motorola had business reasons for
3 participating, right?

4 A Yes.

5 Q Then Motorola dropped out of that particular patent pool,
6 correct?

7 A At the very end, yes.

8 Q Fair to say that Motorola must have had a business reason
9 for dropping out?

10 A I presume they did.

11 Q And you mentioned that -- or it came up in your testimony,
12 the October 2010 letters between Motorola and Microsoft. Do
13 you recall that?

14 A Yes.

15 Q And 2010 -- I just want to make sure we have the timeframe
16 in mind, because the negotiations that you took notes in and
17 testified about was 2003, correct?

18 A 2003 and 2004, correct.

19 Q So several years before 2010?

20 A Correct.

21 MR. CANNON: No further questions.

22 THE COURT: Any redirect?

23 MR. HARRIGAN: No questions.

24 THE COURT: You may step down. Thank you, Mr. Glanz.

25 Microsoft will call its next witness.

1 MS. ROBBINS: Your Honor, Microsoft will call
2 Jennifer Ochs.

3 THE COURT: Ladies and gentlemen, while we get people
4 sorted out here, this person approaching the stand is not
5 Jennifer Ochs, it's a member -- you may step forward -- of
6 Mr. Harrigan's law firm. Lawyers love to do things like give
7 everything a different name. And so opposed to questions and
8 answers, we take depositions. Depositions are conducted
9 during the discovery phase of a trial. They're the way that
10 lawyers find out what the facts are and what a witness knows
11 about a particular matter.

12 They serve a second purpose, which is they also preserve
13 the witness's testimony. There are rules about what happens
14 when a witness is unavailable to testify, whether they've
15 died, whether they've moved to Africa, whether they're
16 outside the jurisdiction of the court. Basically they're not
17 available to testify at trial. And at that point a party can
18 use a deposition of a witness.

19 Sometimes they do that in video form, they actually have a
20 videotape of the deposition and they play that. And
21 sometimes someone plays the person, and the question is
22 asked, and the person who's filling in for that person
23 answers. So you should assume for the purposes of this that
24 it's the same as all other trial testimony, it's simply being
25 presented in deposition form. Thank you.

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JENNIFER OCHS

Testimony being read by Patricia Eakes:

EXAMINATION

BY MS. ROBBINS:

Q Ms. Ochs, by whom are you employed?

A Marvell Semiconductor, Inc.

Q Are you testifying here pursuant to a trial subpoena?

A Yes.

Q What business is Marvell in?

A Marvell designs and markets semiconductor chipsets.

Q What is your position at the company?

A I'm the Director of IP litigation.

Q And as Director of IP litigation, what are your primary responsibilities?

A I oversee all of Marvell's patent litigation cases. I'm also involved in licensing negotiations, to resolve those litigations, and am involved in indemnity issues.

Q As a part of your work at Marvell, do you have some knowledge and familiarity with Marvell's products and Marvell's patents?

A Yes.

Q How long have you been with Marvell?

A About three years.

Q What did you do before that?

1 A I was a partner at Wilson Sonsini in the IP litigation
2 group.

3 Q For how many years?

4 A '97 to 2009.

5 Q And do you have any graduate degrees besides your law
6 degree?

7 A I have a master's in electrical engineering.

8 Q Did you work before attending law school?

9 A I worked as an electrical engineer.

10 Q Now, let's talk about Marvell and its customers. Is
11 Motorola a customer of Marvell?

12 A Yes.

13 Q Is Microsoft a customer of Marvell?

14 A Yes.

15 Q What products does Marvell sell to Microsoft for use in
16 Microsoft's Xbox gaming consoles?

17 A We sell WiFi chips.

18 Q What is a WiFi chip?

19 A It's a chip that implements the 802.11 standard.

20 Q Do the chips sold by Marvell, that you referred to,
21 contain substantially all that is needed to provide 802.11
22 functionality in a product like Xbox?

23 A Yes.

24 Q Approximately how much does Marvell charge for the WiFi
25 chips of the kind it sells to Microsoft?

1 A Between \$3 to \$4.

2 Q And does Marvell sell similar WiFi chips to other
3 customers?

4 A Yes.

5 Q What sorts of products? Can you give us some examples of
6 other customers that purchase these and what they're used in?

7 A The WiFi chips are used in a wide variety of applications,
8 ranging from other gaming systems to automotive applications.

9 Q So, for example, does the Sony PlayStation contain the
10 Marvell IEEE 11 chip?

11 A It does.

12 Q Automobiles. Can you give us an example of an automobile
13 that contains the Marvell 802.11 chip?

14 A It was recently announced that the Audi A-8 will have a
15 Marvell chip.

16 Q Do you have the price range of these various end products
17 that contain Marvell's WiFi chips?

18 A Roughly.

19 Q Can you give us some broad range of what it is?

20 A So, I think the gaming stations are a few hundred dollars.
21 And, of course, the car is, I think, \$80,000. I'm not sure.

22 Q How do the WiFi chips that are sold to Marvell's other
23 customers compare to those that are sold to Microsoft?

24 A They're standards-compliant chips, so they're commodity
25 products, essentially.

1 Q And you have some familiarity with the 802.11 standard?

2 A Yes.

3 Q Has it evolved over time?

4 A It's continually evolving.

5 Q Has Marvell been involved in that process?

6 A Yes. Several Marvell engineers are involved in various
7 802.11 committees. And, in fact, one of our executives is
8 the chair of the 802.11 working group.

9 Q Has Marvell made contributions in the standards
10 development process for 802.11?

11 A Yes.

12 Q And approximately how many issued 802.11 patents does
13 Marvell have, in the United States?

14 A We have a few hundred issued patents.

15 Q How important do you consider the Marvell 802.11 portfolio
16 to new and emerging WiFi products?

17 A Well, we consider our 802.11 portfolio to be very
18 valuable, particularly with respect to the newer standards.
19 We're a younger company. The patents we're pursuing
20 currently are new patents, they have a long life ahead of
21 them. And they relate to the latest 802.11 standards.

22 Q Just to be clear on that, the current standard is -- or
23 the latest is 802.11-N?

24 A That's the latest approved standard. There's the
25 802.11-AC which has been issued, I believe, in draft form.

1 Q How important do you expect your patents to be in
2 connection with AC products?

3 A We believe them to be very important.

4 Q Now, over the past year and a half have you had any
5 dealings with Motorola related to the licensing of Motorola's
6 802.11 essential patents?

7 A Yes.

8 Q Have you been personally involved in those discussions?

9 A Yes.

10 Q Could you turn to Exhibit 1608 in your binder.

11 A Yes.

12 Q Can you tell us what this letter is?

13 A This is a letter that we drafted to Motorola requesting
14 that they provide us with their -- this is a letter we
15 drafted to Motorola requesting they provide us their RAND
16 license.

17 Q The letter is signed by whom?

18 A This was signed by Jinping Yang, who reports to me.

19 Q Who drafted this letter?

20 A I drafted it.

21 Q What is it that prompted you to send this request to
22 Motorola?

23 A Microsoft made a request to us that we request a license
24 on RAND terms from Motorola.

25 Q And was that pursuant to an indemnification arrangement?

1 A Yes.

2 Q And how would a license for Marvell's WiFi chips have
3 benefited Microsoft?

4 A Well, we would have ideally obtained a license that would
5 have exhausted any further claims that would have been made
6 by Motorola against our customers.

7 Q In the first paragraph the letter mentions a March 1994
8 intellectual property statement on the Motorola proposals in
9 the IEEE 802.11 standards body. Do you understand that to be
10 a letter of assurance?

11 A Yes.

12 Q What did you understand Motorola had committed to do based
13 on this letter of assurance?

14 THE COURT: Ms. Robbins you want to maybe slow down
15 just a little bit.

16 A I understood that Motorola had committed to license their
17 standard essential patents on fair, reasonable, and
18 non-discriminatory terms.

19 Q After this letter was sent, did you have some e-mails back
20 and forth with anyone at Motorola?

21 A I did.

22 Q With Mr. Kowolski?

23 A Yes.

24 Q Did you tell Motorola why you wanted the license?

25 A Yes.

1 Q What did you tell them?

2 A That it was our intent to get a license that would protect
3 our customer, Microsoft.

4 Q Did Motorola eventually make a license offer to Marvell?

5 A They did.

6 Q Could you turn to Exhibit 16 in your binder?

7 And there is an e-mail and a draft license agreement.

8 Can you explain what this is?

9 A This e-mail and draft license agreement is what
10 Mr. Kowolski sent to me.

11 Q When did he send it to you?

12 A Friday, November 25, 2011.

13

14 Q I want to ask you about some of the provisions of this
15 proposed draft license agreement you got back from Motorola.
16 As you understand it, did it license -- did the agreement
17 actually include a license for Marvell's chips?

18 A No.

19 Q What did you understand that it would cover?

20 A As I read this agreement, it would cover products that use
21 our chips. But it is not a license to our chips.

22 Q You said you asked for a license to cover the product you
23 sold to Microsoft?

24 A Yes.

25 Q Were any of your customers specifically excluded from this

1 agreement?

2 A Yes. There's a section in the back called "repudiating
3 parties". And those specific parties are excluded from this
4 agreement. And that includes Microsoft and Apple.

5 Q Now, what was your reaction to that?

6 A Well, it was entirely contrary to what we had asked for.
7 We had asked for a license that would enable us to protect
8 our customers, specifically Microsoft in this case.

9 Q Did you consider a license that applied to products that
10 were sold to some of your customers, but excluded others, to
11 be discriminatory?

12 A Yes. I would consider that discriminatory.

13 Q Let's talk about the financial terms of the license offer.
14 What was the royalty rate that Motorola requested that
15 Marvell pay?

16 A The royalty rate was 2.25 percent of the net selling price
17 of the end-user product.

18 Q And did this change based on different end uses of your
19 customer's products?

20 A Well, the percentage, I assume, would not change. But you
21 would apply it against different net selling prices, so the
22 amount effectively would change.

23 Q Let's see how that would work. So if the net selling
24 price of a gaming system, like an Xbox or a Sony PlayStation,
25 including one of the Marvell 802.11 chips, is \$200, as you

1 understand it, the royalty demanded by Motorola would have
2 been \$4.50?

3 A Yes.

4 Q How does that compare to the price of the WiFi chips that
5 Marvell sells?

6 A That royalty is slightly higher than the cost of the chip
7 itself.

8 Q Now, let's see how it would apply in the future if Marvell
9 sold a WiFi chip to a computer manufacturer. Assume with me
10 that a laptop has a net selling price of \$1,000, would the
11 royalty under this proposed license be \$22.50?

12 A Yes.

13 Q And how does that compare to the price that Marvell
14 charges for the WiFi chips?

15 A Well, that's several times the price of our chip.

16 Q Now, you told us earlier that Marvell sells WiFi chips to
17 Audi for use in it's a-8?

18 A That's right.

19 Q Now, let's suppose an A-8 sells for \$100,000. How much
20 would the royalty be that Motorola was asking for?

21 A That would be over \$2,000.

22 Q Now, if Marvell had agreed to the terms of this license,
23 how would that have affected Marvell's chip business, WiFi
24 chip business?

25 A Well, we could not have agreed to these terms. That's a

1 going-out-of-business model to pay such rates.

2 Q Did you consider the royalty provisions of Motorola's
3 offer to be commercially reasonable?

4 A No.

5 Q Would it be practical for Marvell to pay different
6 royalties based on the nature of your customers' end-use
7 products like this?

8 A It would not be practical because in many cases we don't
9 know the end use of our chips.

10 Q Besides Marvell and Motorola, do you understand that there
11 are other companies that claim to have patents that are
12 essential to the 802.11 standard?

13 A Yes.

14 Q And in your view, even if the royalty rate was limited to
15 two and a quarter percent, not of the end price, but just of
16 the Marvell chip, could Marvell afford to pay this royalty to
17 every company that claims that it has essential 802.11
18 patents?

19 A No. The profit margin on semiconductor chips is quite
20 small, and at 2.25 percent of even the chip price, you can't
21 pay too many royalties before you just run out of profit.

22 Q Is patent stacking a concern for you?

23 A Yes. That's the patent stacking problem or royalty
24 stacking problem.

25 Q In your experience have you ever heard of a chip maker

1 paying a running royalty on the end-product price of its
2 customers' products?

3 A I have not heard of that.

4 Q In your experience at Marvell, is there a public benchmark
5 Marvell uses to assess the reasonableness of running
6 royalties of semiconductor chips?

7 A We have in the past used the publicly-reported licensing
8 rate provided by ARM Holdings. That's a publicly-reported
9 rate of one percent of the average selling price of the chip,
10 in exchange for which ARM provides not only patent licenses,
11 but significant IP that can be readily incorporated into a
12 semiconductor chip.

13 Q Does that include design and know-how?

14 A Yes.

15 Q How does Marvell use this benchmark?

16 A Well, for one percent we get considerable IP, which is
17 ready to use. And so we would consider one percent of the
18 average selling price of a chip to be a high ceiling of what
19 a semiconductor company should pay for a royalty.

20 Q And how does what you license from ARM compare to what you
21 would obtain in a license to a party's 802.11 standard
22 essential patent?

23 A So, as I've noted, we don't just license patents, but we
24 also license a microprocessor core, or directions on how to
25 design a microprocessor core. And that's considerable

1 valuable IP.

2 Q Do you consider a two-and-a-quarter percent royalty on the
3 average selling price of the customer end-product that has
4 your chip in it to be a reasonable starting point for any
5 negotiation?

6 A No.

7 Q Do you consider two-and-a-quarter percent of the average
8 selling price, just of your chip, to be a reasonable starting
9 point for a negotiation?

10 A No.

11 MS. ROBBINS: Your Honor, the parties stipulated, we
12 move the admission of Exhibit 1608. No further questions.

13 THE COURT: Mr. Palumbo.

14 MR. PALUMBO: Your Honor, may I clarify for the jury
15 the date on which Ms. Ochs gave this testimony?

16 THE COURT: You may.

17 MR. PALUMBO: This testimony was given on
18 November 14, 2012.

19 EXAMINATION

20 BY MR. PALUMBO:

21 Q Good morning, Ms. Ochs. My name is Ralph Palumbo. And as
22 you might have guessed, I represent Motorola in this matter.
23 Where do you reside?

24 A I live in Palo Alto, California.

25 Q Where were you served with your trial subpoena?

1 A I accepted service by e-mail.

2 Q And were you advised by anyone as to whether or not e-mail
3 acceptance of a subpoena outside the Western District of
4 Washington would compel you to testify here today?

5 A I'm not sure that it does.

6 Q You've negotiated several RAND licenses for chipsets, yes?

7 A Yes.

8 Q You would agree, in negotiating a RAND license, that
9 process can be very complex and time consuming. Yes?

10 A Yes.

11 Q There are a number of material terms that need to be
12 negotiated in a RAND licensing agreement. Also agree?

13 A Yes.

14 Q And those terms would include -- the material terms, would
15 include representations and warranties. Yes?

16 A Yes.

17 Q Geographic scope of the license?

18 A Yes.

19 Q Term of the license that would need to be negotiated.
20 Yes?

21 A Yes.

22 Q Scope of release. Yes?

23 A Yes.

24 Q Products covered by the license would have to be
25 negotiated. Yes?

1 A Yes.

2 Q Typically there would be a defensive suspension provision
3 in a RAND license. Yes?

4 A No, I would not agree with that.

5 Q In the back of your binder you have your testimony before
6 the International Trade Commission. Could you turn to that
7 please, Ms. Ochs?

8 A Yes.

9 Q This was testimony that you gave at a hearing before the
10 United States International Trade Commission on Wednesday,
11 January 18th. Yes?

12 A Yes.

13 Q If you'll turn to page 1937, lines 21 to 25, you were --
14 it's the second page of this -- I'm sorry, it's not the
15 second page. It's 1937.

16 A Yes.

17 Q And you were sworn to testify to the truth, the whole
18 truth, and you agreed to do so. Yes?

19 A I did.

20 Q Will you turn to, now, page 1979. And let's look at,
21 starting at line 3, tell me when you're there, please,
22 Ms. Ochs.

23 A Yes.

24 Q The question you were asked, "Are you familiar with that
25 term? Defensive suspension provision." And you said, "I

1 am." Question: "What is that?" You said, "I am -- typically
2 in the context of entering into a standards body with other
3 competitors, or even in agreements like this, there is a
4 provision whereby if the other party initiates an action
5 against you, you may suspend or somehow modify the RAND
6 obligation." That was the answer you provided?

7 A Yes. So I'm not sure if you're focusing on the word
8 "typically". I am familiar with defensive suspension. I've
9 seen them more recently. And the RAND agreements I've worked
10 on in the past, we had not included such provisions. Now I
11 think the parties are trying to be more sophisticated in
12 including them.

13 Q If you'll turn to the next page, 1980, and we'll start on
14 line 13. Tell me when you're there, Ms. Ochs.

15 A Yes.

16 Q The question was asked, "So the license you would normally
17 expect, and this would be -- this is not an unusual term in
18 license agreements, this defensive suspension provision would
19 exclude a license to Microsoft through Marvell, correct?"
20 And you answered, "Yes. Although we had specifically asked
21 for a license that would cover Microsoft." That was the
22 answer you gave on that day. Yes?

23 A I agree with that. I think as a more nuanced answer, I
24 think that's the more current trend. I believe you started
25 this line of questioning about asking about my background in

1 RAND licenses, and we had not included this previously.

2 Q Okay. Negotiation of a RAND license would also involve
3 the negotiation of the royalty rates. Yes?

4 A Yes.

5 Q And RAND licenses also often include or typically include
6 a cross-licensing agreement. Yes?

7 A Yes.

8 Q And the cross-licensing agreement will affect the royalty
9 rate paid to the licensee. Yes?

10 A It could.

11 Q And in this case Motorola offered a license to Marvell for
12 its 802.11 patents, correct?

13 A Yes.

14 Q And Marvell made a counterproposal in which it offered to
15 license Marvell's 802.11 patents to Motorola, correct?

16 A I'm not sure if you would call it a formal
17 counterproposal. We did have an in-person meeting.

18 Q You actually provided a red-lined counterproposal?

19 A We did. But we didn't provide a number.

20 Q Under Marvell's proposal you would pay nothing to license
21 Motorola's patents, 802.11 patents, and Motorola would pay
22 nothing to license Marvell's 802.11 patents?

23 A That's right.

24 Q So the royalties for your important 802.11 patents and
25 Motorola's 802.11 patents would have canceled each other out,

1 correct?

2 A Yes.

3 Q Now, during the time that you are aware Marvell has been
4 selling semiconductor chips, Motorola never told Marvell it
5 needed a license to Motorola's 802.11 patents, correct?

6 A That's right.

7 Q And, in fact, Motorola affirmatively told Marvell that it
8 had no intention of asserting its 802.11 patents against
9 Marvell, correct?

10 A That's right.

11 Q And after you approached Motorola for a license, you
12 learned that Motorola historically did not license chipset
13 manufacturers, correct?

14 A Yes.

15 Q In fact, you understood that Motorola had a
16 well-established program of licensing end-users such as
17 Microsoft on Motorola's 802.11 patents, correct?

18 A That's what I was told.

19 Q The only reason that Marvell requested a license of
20 Motorola's 802.11 patents was because Microsoft claimed
21 Marvell was contractually obligated to do so. Yes?

22 A Yes.

23 Q And, in fact, Marvell contests that it is required to get
24 a RAND license for Microsoft, right?

25 A We have never conceded that the particular indemnity

1 provision that was invoked here by Microsoft is applicable or
2 controlling. But, nevertheless, we have complied with their
3 request.

4 Q You never admitted that you actually have an obligation to
5 seek a RAND license from Motorola for Microsoft, correct?

6 A We haven't admitted that, under our indemnity obligation,
7 that we are bound to do so. But they're a very significant
8 customer, and so forth. So we'll try and comply.

9 Q Could we have Exhibit 1610. And you will find that in
10 your binder, Ms. Ochs.

11 A Yes, I have it.

12 Q This is a letter from Jinping Yang of Marvell, to Leonard
13 Smith of Microsoft, right?

14 A Yes.

15 Q Let's see if I can refresh your recollection. If you can
16 turn, again, to your ITC testimony. This time let's look at
17 page 1994. And we'll start at page 9, or line 9. Tell me
18 when you have it, Ms. Ochs.

19 A Yes.

20 Q If you'll notice on your copy of Trial Exhibit 1610,
21 there's a letter designation in the upper right-hand corner,
22 CX 819-C. Do you see that?

23 A Yes.

24 Q If you look at line 9, these are questions about CX 819-C,
25 which is now Trial Exhibit 1610.

1 A That's fine.

2 Q It's referring to this letter dated March 24th. And at
3 line 20 you were asked, "Are you familiar with this letter?"
4 You said, "Yes." Question: "You mentioned that you drafted
5 another letter for Jinping Yang. Did you draft this one?"
6 Your answer is: "I believe I drafted this one also."

7 A So, I believe I drafted this one. I don't specifically
8 remember. My recollection at the time of the ITC testimony
9 might have been a little fresher than it is now as to whether
10 I drafted this full letter, or as to whether I edited it,
11 which is what I think I did now.

12 Q If you'll look, Ms. Ochs, at the third paragraph of 1610,
13 the first sentence which says, "The November 30, 2004
14 agreement between Marvell and Microsoft, which you reference
15 in your letter, contains exclusions to our indemnity
16 obligations," and so on. The November 30, 2004 agreement is
17 the agreement that governs Marvell's sale of chipsets to
18 Microsoft. Yes?

19 A Yes.

20 Q That is also the agreement Microsoft claims requires
21 Marvell to indemnify Microsoft by getting a RAND license for
22 Microsoft to Motorola's 802.11 patents. Yes?

23 A Yes.

24 Q The first paragraph, first sentence says, "This letter is
25 in response to Microsoft Corporation's November 24, 2010 and

1 March 14, 2011 letters to Marvell in relation to the patent
2 infringement suits filed by Motorola." Do you see that?

3 A Yes.

4 Q And those letters, the November 24, 2010 and March 11,
5 2011 letters, are the letters in which Microsoft claimed it
6 had the right to require Marvell to procure a RAND license
7 from Motorola, right?

8 A Yes.

9 Q And then if you'll look at the last sentence of the third
10 paragraph which says, "Further, the Motorola action appears
11 to have been a retaliatory effort prompted by Microsoft's
12 initiation of legal proceedings against Motorola. And as
13 such, it is unclear that Marvell owes an indemnity to
14 Microsoft in these circumstances." That's your language,
15 correct?

16 A Yes.

17 Q And so what you're saying there is, look, Microsoft
18 started this fight and began the litigation with Motorola,
19 it's Microsoft's fight, not Marvell's, and we don't think we
20 ought to be involved. That's what you're saying, correct?

21 A In essence, yes.

22 Q What you're saying to Microsoft is that Marvell doesn't
23 owe an indemnity obligation. That was your argument. Yes?

24 A Yes.

25 Q Now, if you'll look at 1608, Ms. Ochs, which you testified

1 about here in your direct examination. This is a letter from
2 Jinping Yang to the patent licensing organization at
3 Motorola. Yes?

4 A Yes.

5 Q And this is another letter that you drafted. Yes?

6 A Yes.

7 Q If you'll look at the last paragraph, this is your
8 request, Marvell's first request to Motorola for a RAND
9 license to Motorola's 802.11 patents, correct?

10 A Right.

11 Q And this letter is seven years after Marvell entered into
12 its purchase agreement with Microsoft, that Microsoft claims
13 requires Marvell to get a license, right?

14 A I don't, off the top of my head, have the date of that
15 agreement. But I'll take your word for it. It is seven
16 years.

17 Q I can refresh your recollection, if you'd like.

18 A If you'd like.

19 Q Again, ITC 1999. And we'll start at line 20. Again, tell
20 me when you're there, Ms. Ochs.

21 A Yes, I see that.

22 Q You were asked the question, "I understand that. And to
23 put a further point on the timeframe involved here, this
24 letter in July 2011 is seven years after Marvell entered into
25 its purchase agreement with Microsoft that required you to

1 indemnify or obtain patents for Microsoft, correct?" And
2 your answer was, "Yes."

3 A Yes. I'm hesitating, because at the ITC I actually had
4 the agreement in front of me so I could confirm the date.
5 And I don't know if it's here. That's the only issue. I'm
6 just not entirely sure what the date was now.

7 Q But, in any case, that was your testimony?

8 A That is what the question was. And I presume I had the
9 agreement in front of me at the time to confirm that was, in
10 fact, the date.

11 Q So, seven years after Motorola started selling chips to
12 Microsoft, Microsoft came to Marvell and said, we want you to
13 get a license from Motorola for the chips you're selling to
14 us, right?

15 A Well, to be sure, throughout the course of this agreement,
16 they have on several occasions asked us to indemnify them for
17 patent-related issues that concern our chips.

18 Q So far as you are aware, Microsoft has not come to Marvell
19 in any other situation in the past seven years and said, we
20 want you to go get a license to these patents to cover our
21 chips, correct?

22 A Typically they asked us to pay their attorneys fees'
23 rather than invoke the other provision. So this is the first
24 time, I think, in my knowledge, to my knowledge, they've
25 invoked this provision.

1 Q You've not heard anything, you're not aware of any
2 instance in the past seven years where Microsoft has come to
3 Marvell and said, we want you to go get a license for patents
4 that cover our chips, right?

5 A Not to my knowledge.

6 Q Now, you testified that Microsoft made its first indemnity
7 demand on November 24, 2010. And then what we see is that
8 Marvell waited eight months, almost eight months until
9 July 18, 2011 to send the letter to Motorola requesting a
10 RAND license, correct?

11 A That's right.

12 Q Now, if you'll look at Exhibit 16, Ms. Ochs, which you
13 also testified about in your direct examination. Exhibit 16
14 are two e-mails from Mr. Kowolski to you, correct?

15 A Yes.

16 Q And they both relate to licensing discussions between
17 Motorola and Marvell, right?

18 A Yes.

19 Q If you'll look at Mr. Kowolski's November 25th e-mail, top
20 of the page, first paragraph, he says, "Further, pursuant to
21 Marvell's request, attached is a copy of the proposed license
22 agreement for Marvell's consideration." Yes?

23 A Yes.

24 Q So on or about the 25th of November -- well, actually, on
25 the 25th of November, Motorola responded and sent you a

1 proposed license agreement, correct?

2 A Yes.

3 Q And Mr. -- and the third paragraph, Mr. Kowolski offers to
4 meet with you the week of December 12th to discuss Motorola's
5 proposed license, correct?

6 A Yes.

7 Q But you didn't meet with Mr. Kowolski in December 2011,
8 did you?

9 A They terminated that meeting, yes.

10 Q In fact, more than five months later, as of June 2012,
11 Marvell had still not provided Motorola with any comments or
12 counterproposal to Motorola's proposed license, right?

13 A Well, we wanted to have this meeting so that we could
14 present the Marvell portfolio to them, to establish the value
15 of that. And they -- after terminating the meeting the week
16 of December 12th, they said they didn't want to meet while
17 the ITC trial was pending. But after some time had passed,
18 then they were available to meet, and we did meet.

19 Q You have, in your binder, Trial Exhibit 3412, if you'll
20 look at that, please, Ms. Ochs, and tell me when you have it
21 in front of you.

22 A Yes.

23 Q And there are two e-mails on this exhibit, one from
24 Mr. Kowolski to you, and one from you to Mr. Kowolski,
25 correct?

1 A Yes.

2 THE COURT: Mr. Palumbo, let's stop you for a second.
3 Ladies and gentlemen, there's about five minutes more
4 testimony in this. I'm going to run us a little bit into the
5 lunch hour and I'll make it up to you on the other end.

6 Q They both relate to licensing discussions. Yes, Ms. Ochs?

7 A Yes.

8 Q If you look at the second e-mail, which is from
9 Mr. Kowolski to you on June 4, 2012, in the second sentence
10 he said, "Given that over six months have passed since
11 Motorola Mobility provided Marvell a draft license agreement,
12 please provide Marvell's comments to that draft, or a
13 counterproposal to Motorola Mobility in advance of our
14 meeting so we can prepare to address Marvell's concerns, if
15 any, at our meeting." That's what Mr. Kowolski wrote you on
16 that day. Yes?

17 A Yes.

18 Q Now, if you'll look at Trial Exhibit 3404, please,
19 Ms. Ochs. And, again, tell me when you're there.

20 A Yes.

21 Q 3404 is an e-mail from you to Mr. Kowolski dated
22 November 7, 2012, and an e-mail from Mr. Kowolski to you
23 dated November 6, 2012, correct?

24 A Yes.

25 Q Both relate to licensing discussions, correct?

1 A That's right.

2 Q Please look at the bottom of the first page of 3404, and
3 continuing on to the second page where Mr. Kowolski writes,
4 "I also write to follow up on our June 26 meeting at
5 Marvell's office. At that meeting, in response to Motorola
6 Mobility's initial proposal, Marvell presented a
7 counterproposal with a royalty-free cross-license." So
8 Marvell finally gave Marvell a counterproposal on the 26th of
9 June, 2012, correct?

10 A Yes.

11 Q And in the counterproposal Marvell proposed to license
12 Motorola to Marvell's 802.11 patents on a royalty-free basis.
13 The royalties would cancel each other out, correct?

14 A Yes.

15 Q Motorola responded to that proposal by asking Marvell to
16 provide claim charts, correct, for these patents?

17 A Yes.

18 Q You agreed to do that, correct?

19 A We did.

20 Q It's now November 2012, and Marvell still hasn't provided
21 any claim charts to Motorola, correct?

22 A We have not. We have some in progress. I'm afraid it
23 hasn't been a high priority. We have other things that are
24 more compelling, and given how far apart we were at the
25 negotiations, it just hasn't been a high priority. But we

1 are almost done. And we can provide those.

2 Q So if my calculations are right, it's been 24 months since
3 Microsoft came to Marvell and said, go get us licenses for
4 Motorola's 802.11 patents, right?

5 A I'll trust your timing.

6 Q There was eight months between Microsoft saying, go get us
7 licenses to Motorola's patents, and the time you actually
8 wrote a letter to Motorola requesting a license, right?

9 A Yes. As we've discussed, we tried to push back on
10 Microsoft as much as we can. This would be a significant
11 undertaking. And we needed to get consensus that this is, in
12 fact, the path we wanted to go down. We were not anxious to
13 go down this path.

14 Q And it was on the 26th of June that you finally provided a
15 counterproposal, right?

16 A Well, we provided a red-lined, you know, it was our
17 opening negotiating proposal.

18 Q Right. And now we've had, since you provided your
19 red-lined and promised to give claim charts, another five
20 months have passed, right?

21 A Yes.

22 Q So it's fair to say, isn't it, Ms. Ochs, that Marvell
23 isn't moving very quickly to get a RAND license for
24 Motorola's 802.11 patents, right?

25 A I suppose that's relative. But, you know, we're doing the

1 best we can.

2 Q Your red-lined proposal to Motorola, when you received
3 Motorola's license, I take it from what you've told us that
4 you didn't think Motorola's license was even in the ballpark,
5 correct?

6 A That's right.

7 Q And you've told us that you thought it was just not at all
8 -- it just wasn't vaguely a reasonable RAND offer, correct?

9 A Right.

10 Q And so the way you responded to that was you made a
11 counteroffer, right? You gave them a red-lined -- you said,
12 we'll give you a cross-license, royalty free. You responded
13 to the offer, despite the fact of the manner in which you
14 viewed it, correct?

15 A I suppose you could characterize it that way, yes.

16 Q Thank you.

17 MR. PALUMBO: Your Honor, just so the record is
18 clear, I think we moved admission of Exhibit 16,
19 Exhibit 1608, Exhibit 1610, Exhibit 3404, Exhibit 3412, which
20 were all admitted when Ms. Ochs testified originally.

21 THE COURT: And they are admitted here.

22 (Exhibit Nos. 16, 1608, 1610, 3404 and 3412 were admitted.)

23 THE COURT: Ms. Robbins, you're going to finish up?

24 MS. ROBBINS: Yes, Your Honor.

25 EXAMINATION

1 BY MS. ROBBINS:

2 Q Ms. Ochs, do you think the Marvell and the Motorola 802.11
3 patent portfolios are of equal value?

4 A No.

5 Q What's your view?

6 A Well, I haven't looked at the entire Motorola portfolio.
7 We've only been focused on these two asserted patents. But
8 those two patents are older. They don't have much life in
9 them. They relate to the older versions of the standard.
10 Our portfolio is very valuable. We're very active in the
11 standards body. The patents we are getting now have direct
12 applicability to the standards and they have a long life
13 ahead of them.

14 Q And why, then, were you willing to propose a royalty-free
15 cross-license?

16 A I think there are some at Marvell who would object and
17 might think that Motorola should be paying us. But given
18 that Microsoft made this request and they're a valuable
19 customer, we thought if we started and proposed that they pay
20 us money, that that wouldn't be viewed as negotiating in good
21 faith. And we got internal authority to just propose royalty
22 free. We thought that's more than fair, even if perhaps we
23 could, you know, get them to be paying us for our portfolio,
24 we have not traditionally asserted patents affirmatively. We
25 use them only defensively.

1 Q Now, regardless of whether you did or you did not have an
2 indemnity obligation to Microsoft, did you believe that
3 Marvell was entitled to a license from Motorola on RAND terms
4 if it asked for one?

5 A As I understand RAND, it means you provide that license to
6 a party that asks. So, yes.

7 MS. ROBBINS: Nothing further. Thank you.

8 THE COURT: You may step down.

9 Ladies and gentlemen, we'll take our lunch break at this
10 time. Remember that until the trial is over, do not discuss
11 this case with anyone, including your fellow jurors, members
12 of your family, people involved in the trial, or anyone else.
13 Do not allow anyone else to discuss the case with you. This
14 includes discussing the case in internet chat rooms, or
15 through internet blogs, bulletin boards, e-mails, or text
16 messaging. If anyone tries to communicate with you about the
17 case, please let me know about it immediately.

18 Do not read, watch, or listen to any news reports or other
19 accounts about the trial, or anyone associated with it,
20 including any on-line information. Do not do any research
21 such as consulting dictionaries, searching the internet, or
22 using other reference materials. And do not make any
23 investigation about the case on your own.

24 Finally, keep an open mind until all the evidence has been
25 presented, and you have heard the arguments of counsel, my

1 instructions on the law, and the views of your fellow jurors.
2 If anyone needs to speak with me about anything, simply give
3 a signed note to the bailiff.

4 Ladies and gentlemen, we'll ask you to be back about --
5 1:35 is when we'll bring you out, so maybe you can be here by
6 1:30, or so. In the meantime, enjoy your lunch.

7 (The following occurred outside the presence of the jury.)

8 THE COURT: We'll be in recess until 1:35.

9 (The proceedings recessed.)
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1 AFTERNOON SESSION

2 THE COURT: Counsel, the jury has another couple of
3 minutes before we bring them out. In the meantime, we have
4 another note. "Could the meaning of", quote, "indemnify,"
5 unquote -- I'm not sure what the next word is, blank, "in
6 the contract of the Marvell request for license please be
7 explained."

8 MR. PALUMBO: "In the context," I believe, your
9 Honor.

10 THE COURT: Oh, "in the context." I am open to
11 suggestions. Mr. Pritikin.

12 MR. PRITIKIN: I will take a stab at it. We think it
13 would be helpful for you to answer the question that has been
14 raised. We have been trying to craft some language. I would
15 hope this can be done cooperatively and by agreement. I am
16 willing to take a crack at it.

17 THE COURT: I am going to say when we bring the jury
18 out, we got the note and we will get back to you. Since the
19 witness is off the stand, I'm not sure. Mr. Palumbo.

20 MR. PALUMBO: Your Honor, the contract between
21 Marvell and Microsoft is part -- it is, in fact, Exhibits 16,
22 17. It has the usual lawyers indemnification provision,
23 which will be certainly obscure to an old trial lawyer like
24 me, and I think it will be equally obscure to the jury. I
25 think what we do have is we have Jennifer Ochs' testimony.

1 And I asked her, "This letter is in response to Microsoft
2 Corporation November 24, 2010 and March 14, 2011 letters to
3 Marvell in relation to the patent infringement suits?" And
4 she says, "Those are the letters," quote -- "letters in which
5 Microsoft claimed it had the right to require Marvell to
6 procure a RAND license from Motorola." If you look at that
7 testimony, it also references the original November 2004
8 agreement, out of which Microsoft claims, and Ms. Ochs
9 agrees, that the indemnity obligation arises.

10 So in the context of this lawsuit, we have testimony from
11 Ms. Ochs who says that Microsoft is claiming that the
12 indemnity obligation, quote, "requires Marvell to procure a
13 RAND license from Motorola." And it is also clear from
14 Ms. Ochs' testimony that Marvell's position is that indemnity
15 obligation does not require Marvell to seek a license. Ms.
16 Ochs says -- I asked her the question, "What you are saying
17 to Microsoft is that Marvell doesn't owe an indemnity
18 obligation? That was your argument? Yes?" And she says,
19 "Yes." So I think if we want to clarify this, the indemnity
20 obligation in this context, Microsoft says requires Marvell
21 to get a license from Motorola for Motorola's 802.11 patents,
22 and Marvell's interpretation of the same provision is that it
23 does not have that obligation.

24 THE COURT: Why don't both of you do your provisions.
25 I think that is one aspect of indemnify. I agree that is the

1 testimony. I'm not sure that is the exclusive meaning.

2 MR. PALUMBO: I was limiting it to the note which
3 says, "in the context of the Marvell request." In that
4 context, that's the evidence that we have in the record in
5 this case.

6 THE COURT: All right. I won't ask you to get that
7 done by the 3:00 break, but you can put it on your list of
8 homework for tonight.

9 Counsel, are we ready to bring in the jury? Who is the
10 next witness?

11 MR. PRITIKIN: The next witness is Mr. Gutierrez,
12 your Honor.

13 THE COURT: Mr. Palumbo, you did a very nice job of
14 playing yourself.

15 (At this time the jury entered the courtroom.)

16 THE COURT: The next witness Microsoft calls is
17 Mr. Gutierrez.

18 Whereupon,

19 HORACIO GUTIERREZ,
20 Called as a witness, was sworn and testified as follows:

21 MR. PRITIKIN: May I approach and hand up some
22 notebooks?

23 THE COURT: Yes. You may inquire.

24 REDIRECT EXAMINATION

25 By Mr. Pritikin:

1 Q Good afternoon, Mr. Gutierrez.

2 A Good afternoon.

3 Q Where do you work, sir?

4 A I work at Microsoft.

5 Q What is your job title?

6 A Corporate vice-president and deputy general counsel.

7 Q What areas are you responsible for?

8 A I am responsible for the intellectual property group, the
9 standards group, the regulatory affairs group and the legal
10 group that supports the research and development function.

11 Q And can you tell us briefly what your responsibilities are
12 as head of the IP group?

13 A That group includes the full range of IP support, the
14 patent team, the copyright team, trademarks, licensing.

15 Q Do the responsibilities of the IP group at Microsoft
16 include patent litigation?

17 A No, they don't.

18 Q And who handles that at Microsoft?

19 A There is a specialized patent litigation team that is part
20 of the litigation department at Microsoft.

21 Q Let's talk for just a few minutes about your personal
22 background. Where were you born and where did you grow up?

23 A I was born in Venezuela, and I was raised there.

24 Q And can you describe your education for the jury?

25 A I became licensed as an attorney in Venezuela, and then

1 pursued postgraduate degrees there. After that I came to the
2 U.S. with a Fulbright scholarship to attend Harvard Law
3 School, where I got a master in law. Later on, when I moved
4 back to the U.S. for good, I went to law school again to take
5 my juris doctorate degree at night while I was working
6 full-time.

7 Q What year did you join Microsoft?

8 A 1998.

9 Q And how long have you been the head of intellectual
10 property?

11 A Since the summer of 2006, so that's seven years.

12 Q Now, based on your experience as head of intellectual
13 property for Microsoft for the last seven years, have you
14 become familiar with industry custom and practice in
15 negotiating patent licenses?

16 A Yes.

17 Q Could you turn, please -- Do you have a witness binder up
18 there?

19 A I do.

20 Q Could you turn, please, to exhibit -- the document that is
21 marked as Exhibit 1. Let's put that on. This is in
22 evidence. Let's put this on the screen. Is this a letter
23 that you received from Kirk Dailey at Motorola, dated
24 October 21, 2010?

25 A Yes.

1 Q And did it offer to license Motorola's 802.11 essential
2 patents?

3 A Yes.

4 Q And let's look next at Exhibit 2. Is this the letter you
5 received from Mr. Daily, dated October 29th, 2010, offering
6 to license Motorola's H.264 essential patents?

7 A Yes.

8 Q Let's leave this one on the screen for a few minutes.
9 What is the royalty rate that is offered in this letter?

10 A It is 2.25, but calculated not on the basis of Microsoft's
11 own component software, but on the basis of the products
12 manufactured by PC and device manufacturers.

13 Q Let's pull up the last sentence of the second paragraph,
14 if we could. Is this the sentence you were just referring
15 to?

16 A Yes, that is the sentence that struck me as highly
17 unusual.

18 Q And can you explain what your reaction was when you saw
19 this letter, and this sentence in particular?

20 A Well, it was clear, both from the percentage as well as
21 the base that they were using to calculate it, that the
22 royalty would yield an outrageous amount of money, that in no
23 way could be viewed to be a reasonable royalty demand.

24 Q Who makes and sells the PCs and laptops that include
25 Windows operating system software?

1 A Microsoft's business model is traditionally to do the
2 software. We do the operating system, and then that becomes
3 a component to a full computer -- a computing device that
4 somebody else makes. So that would be companies like Dell or
5 Hewlett Packard or Lenovo, or Toshiba, companies all over the
6 world, in Taiwan and Japan and everywhere.

7 Q It also talks about Windows Phone 7 software. What is
8 that?

9 A That is the operating system that we make that is
10 optimized for a handheld device, like a phone, or, you know,
11 a mobile device.

12 Q And, generally, who makes the phones that contain Windows
13 mobile software or Windows phone software?

14 A Also the hardware manufacturers, in this case the most
15 common ones that people will have heard of are Samsung, HTC,
16 LG, Nokia, companies like that.

17 Q Now, when the letter said that the royalty would be based
18 on the end-product price and not the component software, what
19 did you understand that to mean for Windows Phone 7 software?

20 A That Microsoft would have to pay a royalty that would be
21 calculated on the basis of a product that was much more
22 expensive than the product we were selling, so that that
23 would have a multiplying effect on the royalty obligation for
24 us, and would make it incredibly difficult for us to really
25 make the business model of the operating system work.

1 Q Are you aware of anyone in Microsoft who knows what
2 Microsoft's customers actually receive for their computer
3 products and phones?

4 A No. These are the prices they set when they sell their
5 products to their customers. So we have no influence over
6 that. We have no visibility over that. And also, keep in
7 mind, a company like Hewlett Packard has dozens of PC models,
8 and they vary by country and by jurisdiction, and they have
9 different pricing models. There is really no way that we
10 would have this ability of what they are charging their
11 customers all over the world. We wouldn't be able to tell
12 for sure what it is.

13 Q Are you aware of any agreement in which Microsoft has been
14 required to pay a percentage royalty that is calculated on
15 the price of products sold, not by Microsoft but by
16 Microsoft's customers?

17 A I'm not aware of any. And I wouldn't agree to an
18 agreement like that.

19 Q If there were such an agreement, how would Microsoft know
20 how much exactly it owed in royalties?

21 A We couldn't. Because it is a percentage of the revenue
22 that dozens of other people generate on the sales of hundreds
23 of devices all over the world. There would be no way for us
24 to be able to even calculate what the royalty obligation is.

25 Q Now, I want to ask you some questions, Mr. Gutierrez,

1 about the economics of the offer. Let's put up a
2 demonstrative that has been used before, PDX 1 at slide 17.
3 Let's assume a case of a \$500 laptop. How much money was
4 Motorola asking Microsoft to pay for a copy of Windows
5 installed on a \$500 laptop?

6 A \$11.25.

7 Q And are some laptops more expensive than that?

8 A Yes. I mean, if you go to a store you will find a whole
9 range of laptops, that in some cases go to a thousand or even
10 \$2,000. So even this would be a somewhat conservative
11 estimate.

12 Q Are you aware of what the court found to be a RAND royalty
13 for Microsoft's H.264 -- for Motorola's H.264 patents?

14 A Roughly half a cent.

15 Q Let's take a look at another demonstrative, PDX 1, slide
16 18. Now, if Microsoft had paid the royalty rate in this
17 letter, how much money would the annual payments have
18 amounted to for Windows?

19 A If you take into consideration the estimates that are out
20 there about the revenue that the hardware manufacturers make,
21 and applied it to 2.25 percent, that would have been north of
22 \$4 billion every year.

23 Q Would Microsoft have owed royalties for past years as
24 well?

25 A Yes, on top of that, those are just the annual prospective

1 royalties. On top of that we would have had to pay past
2 damages, which using the same methodology we would estimate
3 would be north of \$20 billion.

4 Q Using the RAND rate determined by the court for Motorola's
5 H.264 patents, how much would Microsoft's annual royalty
6 payments be?

7 A Less than \$2 million a year.

8 Q Let's talk for a moment about the economics of the offer
9 as it pertains to the Windows software. Could you explain
10 that to the jury?

11 A Yeah. In that case you are talking about a phone that on
12 average would have a price of between four- and \$600. If you
13 assume it is a \$400 phone - that is the actual final phone
14 system, not something we make, something the manufacturer
15 makes - and you applied 2.25 percent, you are talking about a
16 \$9 per unit royalty.

17 Q Did you consider that a reasonable royalty for Motorola's
18 H.264 patents for Windows mobile software?

19 A No. It was clearly not a reasonable royalty.

20 Q The letter also references Xbox. Do you have an
21 understanding as to how much an Xbox sells for?

22 A Yes. It depends on what model of the Xbox. We have some
23 that are high end and some that are sort of entry level. I
24 think the high-end Xbox would be \$399, and that includes
25 Kinect, that includes a number of things. Again, if you

1 apply 2.25 percent to roughly \$400, that is roughly \$9 per
2 unit.

3 Q And did you consider that to be a reasonable royalty for
4 Motorola's H.264 patents?

5 A No.

6 Q Do you have an understanding of what royalty stacking is?

7 A Yes, I do.

8 Q Could you explain to the jury what royalty stacking is?

9 A Sure. In the context of a standard like H.264, stacking
10 relates to the fact that when a standard is created there are
11 likely to be multiple companies that claim to have IP on it.
12 And, therefore, in determining what a reasonable royalty is
13 for that, you have to think not only of a single person
14 holding a patent, but you have to look at what the cumulative
15 impact would be of all the people who hold the patent. In
16 trying to calculate a reasonable royalty, you have to take
17 into account all of the patents in the system. And obviously
18 the standard organizations have an interest in making sure
19 that that burden of the IP cost is not so high that would
20 discourage the adoption of the standard in the industry.

21 Q Now, let's relate this to H.264. Do you have an
22 understanding of how many companies own patents that are
23 essential to the H.264 video standard?

24 A At least 55 companies, if not more. 52. I'm sorry.

25 Q And if all of those were entitled to a 2.25 percent

1 royalty, would it have been feasible for Microsoft to support
2 the H.264 video standard in Microsoft's products?

3 A This is simple math. You have 52 -- at least 52
4 patentholders, each potentially asking for 2.25 percent.
5 That adds to more than 100 percent. So essentially the IP
6 cost would be higher than the price at which the product is
7 sold.

8 Q Suppose some of the companies don't ask for the
9 2.25 percent, does that mean that one company's request is
10 reasonable?

11 A No, that doesn't make it reasonable. First of all, you
12 have to look at the overall IP burden. In calculating your
13 RAND rate you actually have to have a sanity check of what
14 the effect of stacking would be. Because nobody can really
15 predict which companies are going to ask for a royalty or
16 not. And once a company is in fact able to extract a high
17 royalty, you are actually going to be encouraging everybody
18 else to come out of the woodwork and be asking for excessive
19 royalties, too.

20 Q Now, did the concept of royalty stacking play any part in
21 the conclusions that you drew as to the reasonableness of the
22 Motorola request?

23 A Once again, any outcome in which the royalty that someone
24 is asking amounts to more than the price in which the product
25 is sold, it obviously has a massive stacking problem. It is

1 a clearly outrageous economic outcome. It is a demand that
2 can be by no means considered to be consistent with RAND.

3 Q Are there other standards, besides H.264, that Windows and
4 Windows Phone and Xbox need to comply with?

5 A There are many. This is the case for software in general,
6 but especially when you are talking about an operating system
7 that is a platform, whose mission is to be able to integrate
8 with hardware, to connect with the internet, to connect with
9 applications and other software. There are virtually
10 hundreds of standards that have to be supported, some of them
11 to be able to play video like H.264, some of them connect to
12 the web, or connect to WiFi, or things like that. Those are
13 just a few examples. There are literally hundreds of
14 standards that are supported in a modern, sophisticated
15 operating system.

16 Q Would it have been feasible for Microsoft to pay the level
17 of royalties requested by Motorola to all of the owners of
18 patents essential to all of the standards supported by these
19 products?

20 A No -- Once again, economically it would have been
21 impossible to pay those royalties.

22 Q Did you consider the October 29, 2010 letter to be a
23 commercially reasonable offer?

24 A There is nothing reasonable about this letter. This
25 letter was blatantly unreasonable on its terms.

1 Q Let's look at the October 21st letter, which is Exhibit 1.
2 Can we put that on the screen? Let's look at the last
3 sentence, I believe, in the first paragraph. What was the
4 royalty base -- Let me stop there for a moment. Can you
5 explain to the jury what a royalty base is?

6 A When you are looking at a royalty, it is not enough to
7 just look at the percentage. The percentage only has a
8 meaning once you determine what you are applying the
9 percentage to. It is not the same to do a 2.25 percent over
10 a base of \$1, or applying 2.25 percent over the base of a
11 billion dollars. It is important here because, once again,
12 it shows that the 2.25 percent then had to be applied, not to
13 the products that Microsoft makes, and for which we generate
14 revenue, We were basically being asked to pay Motorola a
15 royalty based on the price that third parties, our customers,
16 charge to their own customers.

17 Q Are you referring to the Windows mobile software?

18 A That is in the case of the Windows mobile software.

19 Q To be clear, in the case of the Xbox 360, that is a
20 product that Microsoft makes?

21 A Microsoft does make the Xbox 360 itself, yes.

22 Q Now, I want to talk a little bit about the economics of
23 this offer and how it compares with RAND. Let's put up --
24 Let's just go through this. I think we can do it quickly.
25 The jury has seen some of this before. You told us a few

1 minutes ago that an Xbox console, I think, sells for between
2 \$200 and \$400?

3 A Correct.

4 Q So what would the royalty have amounted to, according to
5 this letter, on a \$400 Xbox?

6 A 2.25 percent of 400 would be roughly \$9.

7 Q And what is your understanding of what the RAND rate is
8 that has been determined by this court?

9 A For the 802.11 is, I think, three and a half cents.

10 Q All right. And is there a particular component within the
11 Xbox that provides the 802.11 functionality?

12 A Yeah. The WiFi functionality is provided by a chip that
13 we obtained from a supplier, and then we install it as a
14 component in the Xbox.

15 Q And approximately how much was Microsoft paying for that
16 chip?

17 A Approximately \$3 per chip.

18 Q How does the amount that Motorola was asking for as a
19 royalty on its 802.11 patents compare to the cost of the
20 chip?

21 A Well, the chip costs \$3, and the royalty was \$9, so it was
22 roughly three times the cost of the chip that provides the
23 functionality on which they claim to have essential patents.

24 Q Let's talk again about royalty stacking. Do you have an
25 understanding of how many companies have declared patents as

1 essential to the 802.11 standard?

2 A It is at least 92 companies.

3 Q And, again, I will ask you, if every company with 802.11
4 standards-essential patents was entitled to a 2.25 percent
5 royalty, would it have been practical for Microsoft to pay
6 royalties at that rate to all of the owners of
7 standards-essential patents?

8 A No. Again, talking about a 2.25 percent royalty, you
9 multiply that times 92, you are really talking about, you
10 know, a royalty that is double the actual price of the device
11 itself.

12 Q Did you consider this letter to be a commercially
13 reasonable offer, sir?

14 A No.

15 Q Now, I want to ask you about a couple of the terms that
16 appear in both of the letters. Maybe we can put them up side
17 by side. Now, let's look at the -- Let's pull out the
18 language on the letter on the left. It says, "Including a
19 reasonable royalty of" -- down here, "of 2.25 percent." I
20 want to direct your attention to the language, Mr. Gutierrez,
21 that says, "Subject to a grant-back license under the 802.11
22 essential patents of Microsoft. Do you see that language?

23 A I do.

24 Q And is there comparable language in the October 29th
25 letter relating to the H.264 patents? We don't have to pull

1 it out.

2 A Yes. It is in the second paragraph, the third line,
3 "Subject to a grant-back license under the H.264 patents of
4 Microsoft."

5 Q And when you received these letters, what did you
6 understand that to mean?

7 A I understood it to mean what it says, that their royalty
8 offer assumes that they are getting a license back under our
9 portfolio of patents for H.264 and 802.11, and that their
10 calculation assumed that that value was there, so they were
11 getting a license for free to our portfolio. And mind you,
12 in H.264 specifically, Microsoft had been very involved in
13 the development of that technology, and we held two or three
14 times as many patents as Motorola had. So they were asking
15 to get that value for free, and on top of that charging us a
16 royalty.

17 Q Now, each of these letters put forward a 2.25 percent
18 royalty; is that right?

19 A Yes.

20 Q One for 802.11 and one for H.264?

21 A Correct.

22 Q And in the case of Xbox, both standards are supported?

23 A Correct.

24 Q What was your understanding of the combined effect of the
25 royalty rates that were listed in these two letters?

1 A Well, again, I read the letters to mean what they say,
2 which is these are two independent royalty demands based on
3 different sets of technology that for each of which Motorola
4 expected to receive a 2.25 percent royalty calculated on the
5 final product. So the plain meaning of that is, if you have
6 a product that uses both, you have to pay for both. So, in
7 fact, the royalty for those products would be double
8 2.25 percent.

9 Q Now, you are aware from some of the prior proceedings that
10 Motorola has said that they only collect one 2.25 percent
11 royalty, they don't collect it twice. Is that the way you
12 read the letters when you got them?

13 A No. I read the letters to say what they say, which is,
14 they are independent royalty demands based on two sets of
15 patents on completely different technologies with independent
16 royalty demands for each of them.

17 Q Did you think at the time that Motorola needed additional
18 information from Microsoft to know whether the demands were
19 reasonable or unreasonable?

20 A No. The reality is the information about our business
21 model and the products that we make is, I think, pretty
22 obvious to everyone. There is plenty of public information
23 about this. There are publicly available estimates of the
24 sales of PC makers. It shouldn't have been hard at all for
25 them to know the magnitude of the royalty demand they were

1 making and the fact that it was just plainly outrageous.

2 Q Is Motorola an OEM for Microsoft?

3 A They used to be an OEM. They used to license both PC
4 operating systems -- they used to make Windows personal
5 computers, and also Windows mobile -- Motorola devices that
6 ran on the Windows operating system.

7 Q And what conclusions do you draw from that, sir?

8 A That they --

9 MR. PRICE: Objection, your Honor. It is vague.

10 By Mr. Pritikin:

11 Q How does that figure into how you --

12 THE COURT: Stop.

13 MR. PRITIKIN: I was going to rephrase.

14 THE COURT: Why don't you go ahead and rephrase the
15 question, counsel?

16 By Mr. Pritikin:

17 Q How did that bear on your assessment of the request?

18 A Motorola knew --

19 MR. PRICE: I will object. Assumes facts not in
20 evidence, which is that he considered this at the time.

21 THE COURT: Overruled.

22 THE WITNESS: Motorola knew firsthand because they
23 had been a customer of Microsoft and had licensed our
24 operating system platform, both for PCs and phones, the terms
25 under which we would license those, and they understood our

1 business model. So it certainly wouldn't have been hard for
2 them to have a pretty good sense of the improper nature of
3 the royalty demand that they were making.

4 By Mr. Pritikin:

5 Q Now, if you assume that these letters were not asking for
6 4.50 percent combined, but each of them is asking for
7 2.25 percent, does that in any way change your opinion as to
8 the reasonableness of the request?

9 A No, it doesn't. On some of the estimates that we have
10 talked about earlier, they are not adding the two royalties,
11 they are just considering what the impact of one of those
12 would be. So each of them independently contains what is a
13 really outrageous royalty demand, even without the need to
14 add the two royalties rates.

15 Q Now, Mr. Gutierrez, I want to ask you about what was in
16 your mind when you looked at these letters. What was your
17 thinking? Why did you think Motorola was sending letters
18 with terms that Microsoft could not accept?

19 MR. PRICE: Objection. Calls for speculation.

20 THE COURT: Overruled.

21 THE WITNESS: The letter in and of itself makes it
22 plain that these were not terms that we could accept. In
23 fact, this letter made it impossible for us to be able to
24 accept this offer. And this letter was received in the
25 context of earlier conversations that I have had with

1 Mr. Dailey in which he had made it quite clear that Motorola
2 intended to sue Microsoft, and that in fact Microsoft
3 ultimately would regret having taken the step to -- want to
4 have Motorola respect Microsoft's own IP. To me this was
5 clearly a sham letter, whose purpose was really to clear the
6 way to their filing of an action, which is exactly what they
7 did.

8 By Mr. Pritikin:

9 Q Let's talk a little bit about the background that led up
10 to these letters. Let's pull up the timeline, PDX 2. The
11 jury has seen this before. Now, did there come a time in
12 2010 when --

13 THE COURT: Mr. Pritikin, stop for a second. Ladies
14 and gentlemen, this is a demonstrative. It is not an exhibit
15 that has been admitted. Thank you.

16 By Mr. Pritikin:

17 Q Did there come a time in 2010 when Microsoft filed patent
18 infringement lawsuits against Motorola?

19 A Yes, we did.

20 Q And can you identify the date of that?

21 A That was October 1st of 2010.

22 Q Did Microsoft sue Motorola on any patents that were
23 essential to 802.11 or H.264?

24 A No.

25 Q What products did you accuse in the lawsuit?

1 A It was Motorola's Android smartphones and tablets.

2 Q Does Microsoft have an Android licensing program?

3 A We do.

4 Q And could you tell the jury a little bit about Microsoft's
5 Android licensing program?

6 A Sure.

7 MR. PRICE: Objection. Vague as to time, your Honor.

8 THE COURT: Why don't we put a point of time on it?

9 By Mr. Pritikin:

10 Q Let's talk about the Android licensing program today, and
11 then we can go back.

12 A So Microsoft has invested, over decades, billions of
13 dollars every year in developing technologies for operating
14 systems, in particular, and applications for devices. And as
15 a result of that we have developed a portfolio of over 70,000
16 patents and patent applications worldwide. We've decided as
17 a matter of policy that we are open to licensing those to
18 third parties. Some companies would just hold those patents
19 and keep them to themselves. In this case we felt that the
20 Android operating system had a number of features in it that
21 were infringing of our patents, and we decided the way to
22 deal with that that would be most constructive, since many of
23 these companies that make these devices are also our
24 customers, was to enter into license agreements with them in
25 trying to find a way to license or cross-license those

1 portfolios. So that's what we have done. And now days about
2 80 percent of all the Android smartphones that are sold in
3 the U.S. come licensed to Microsoft's full portfolio of
4 70,000 patents. So the vast majority of the Android devices
5 in the U.S. market are covered by a Microsoft -- a license to
6 Microsoft's patents.

7 Q And are there any notable exceptions that have not agreed
8 to take a license?

9 A Virtually all of the major companies have signed licenses;
10 the Samsungs, the LGs, HTC, all the major vendors have taken
11 licenses. I think the outlier in this case is actually
12 Motorola.

13 Q Now, when you filed the patent infringement cases against
14 Motorola, were you trying to put the Android phones out of
15 business?

16 A No. If you are trying -- We are offering a license on
17 our patents. And you have plenty of examples of companies
18 that are thriving in their Android business models; Samsung
19 is a perfect example, who signed a license agreement with
20 Microsoft and is actually having tremendous success in the
21 marketplace.

22 Q Let's talk about what happened after the suit was filed on
23 October 1st. Were there communications with Motorola the
24 same day?

25 A Can you repeat the question, sir?

1 Q Yes. We are going back to the day the lawsuits were first
2 filed. Were their communications with Motorola the same day?

3 A Yes.

4 Q Tell us what those communications were?

5 A Well, there were communications at different levels within
6 the company. The same day that we filed the action our CEO,
7 Steve Balmer, called their COE, Sanjay Jha --

8 MR. PRICE: I will object to lack of foundation on
9 this, your Honor.

10 THE COURT: Why don't we establish how he would know
11 this?

12 By Mr. Pritikin:

13 Q How were you aware of the fact that there was outreach or
14 communications that day?

15 A Well, we had discussed - the Microsoft CEO, the general
16 counsel and myself - that upon filing the action that we
17 should reach out to Motorola, to give them a courtesy call,
18 to let them know that the reasons why the action was being
19 taken, and then to explore whether we could start a
20 discussion that would lead to a path to resolving the issues.

21 Q So tell us again what the outreach was that was set up?

22 A So there was --

23 MR. PRICE: Object as to foundation, as to anyone but
24 him.

25 THE COURT: Overruled.

1 THE WITNESS: So the CEO of Microsoft, Steve Balmer,
2 called the CEO of Motorola Mobility, Sanjay Jha; our senior
3 counsel, Brad Smith, called Motorola's general counsel,
4 Mr. Scott Offer; and I called Mr. Dailey directly.

5 By Mr. Pritikin:

6 Q Since you were on that call, that's the one I am going to
7 ask you about, Mr. Gutierrez. When did you have your first
8 conversation with Mr. Dailey after the lawsuit was filed?

9 A It was the same day when the lawsuit was filed. I
10 remember having tried a couple of times to get through to him
11 and not being able to connect. But then eventually, late in
12 the afternoon of that Friday, he called me back. It was the
13 evening, his time, the afternoon of my day here.

14 Q And what did Mr. Dailey say to you in that conversation?

15 A Well, he was clearly very agitated. He was upset. He
16 told me that Microsoft had made a grave mistake in filing the
17 action. He said that if Microsoft desired war, that they
18 were fully prepared to go to war, that they would sue us, and
19 that in the end Microsoft would come to regret having taken
20 that step.

21 Q And what did you say to Mr. Dailey about Motorola's
22 patents?

23 A I told him that I understood that he would be upset that
24 day, but that the message that I wanted to leave him with is
25 that we were fully prepared to have a conversation with

1 Motorola that would lead to a resolution of the issues
2 between the companies in a fair manner; that if there was a
3 path to something other than protracted litigation, that we
4 were open to doing it; and that we understood that would have
5 to be a two-way street; that we would also have to recognize
6 that they may have patents that read on our products, and
7 that also meant that we needed to be prepared to give them
8 fair compensation for those patents. And I confirmed to him
9 that, in fact, we were prepared to do that.

10 Q Now, in the several weeks after Microsoft filed its
11 lawsuit, did someone at Microsoft invite Motorola to identify
12 what patents it thought were pertinent to Microsoft's
13 products?

14 A Yes.

15 Q When Microsoft asked Motorola to identify patents that
16 were pertinent to Microsoft's products, did Microsoft invite
17 the October 21 and October 29 letters?

18 A No. We did not invite to be held up in the way these
19 letters do. We invited a conversation about reasonable
20 compensation between the companies.

21 Q During your conversations with Mr. Dailey, did you make
22 arrangements for an in-person meeting?

23 A Yes, we did.

24 Q And tell us about when the meeting was going to occur and
25 how it was set up?

1 A So we had been trying to set up a meeting before the
2 litigation took place, but that actually never happened for,
3 I think, scheduling reasons. Once the litigation was filed
4 and we had that conversation -- Mr. Dailey and I had had
5 conversations I believe it was the week after the action, in
6 which we talked about how it was probably a good idea to try
7 to bring the two general counsel together, have a
8 face-to-face meeting, and see if, in fact, we could find a
9 path through which the parties could come together and put an
10 end to the litigation and prevent further litigation.

11 Q Now, the letter relating to 802.11 is dated October 21st.
12 When did you receive the letter?

13 A I actually didn't receive that letter until the next
14 morning, the morning of October 22nd.

15 Q And what was the date that the meeting was planned for?

16 A The meeting was planned for the morning of October 22nd.
17 So I got the letter right before the face-to-face meeting was
18 supposed to take place.

19 Q When you got the letter, what did you do with it?

20 A Well, I opened it, it was an attachment to an e-mail, I
21 read it, and upon reading it I forwarded it to a number of
22 other people in the legal department.

23 Q When you got the letter just before the meeting, did you
24 think about cancelling it?

25 A Well, their general counsel had traveled all the way to

1 Seattle, he was here already physically. We thought that the
2 right thing to do was actually to focus on trying to find a
3 constructive way forward and to try to focus on solutions as
4 opposed to really focusing our attention on something that
5 was clearly not going to lead to a constructive engagement.

6 Q Did you discuss the letter at all at the meeting?

7 A No. I remember making a joke as a means of defusing the
8 tension, that we had gotten there missive earlier, and then
9 after that there was really no further discussion of it.

10 Q Who attended the meeting?

11 A It was the general counsels of both companies; again,
12 Mr. Smith for Microsoft, and Mr. Offer for Motorola, and then
13 Mr. Dailey and myself.

14 Q Was there any discussion at that meeting of Motorola's
15 standards-essential patents?

16 A No, I don't believe there was.

17 Q And, again, can you tell us generally what was said at the
18 meeting?

19 A During the meeting we tried to explore whether both sides
20 were open to starting this conversation process that would
21 lead to a settlement. And I think the conclusion of that is
22 that both parties would be willing to undertake such a
23 process. There was obviously no guarantee that we would be
24 able to get there, but that both parties were interested in
25 having a conversation to try to avert litigation and put an

1 end to the existing litigation.

2 Q Now, the H.264 letter is dated October 29th, 2010. Was
3 that a week after the meeting?

4 A Roughly a week after.

5 Q And when you received that letter, what did you do with
6 it?

7 A Well, once again, I opened the letter and I read it. It
8 seemed to me even more outrageous than the first letter in
9 some significant respects. And to me, that letter, coming on
10 the heels of having had a discussion where we felt there was
11 a possibility of a constructive path forward, to me it
12 just -- it was very clear that the letters were preparatory
13 steps for an action that they would be filing, and which
14 Mr. Dailey had told me they would be filing.

15 Q At the time you received the letter on H.264, that's the
16 October 29th letter, were you aware of a patent pool that
17 licensed H.264 patents?

18 A Yes, I was.

19 Q And what is that pool?

20 A It is called the AVC pool, and it is a pool managed by an
21 entity called MPEG LA. It is a pool that has a number of the
22 key patentholders in the H.264 field. I think there were
23 roughly 30 patentholders that had committed their patents to
24 that pool. The pool's mission was to license that whole set
25 of patents from all of those companies broadly to the

1 industry. And we had been members of that pool, and we were
2 both licensees, in terms of licensing our portfolio out to
3 everyone, as well as we would take a license, and we were
4 paying royalties to the pool members in exchange for the
5 licenses to their patents we were getting.

6 Q How many patents were there in the pool?

7 A I believe something over 2,400 patents. And they have
8 signed over 1,000 license agreements with companies
9 throughout the world.

10 Q Now, I want to make sure we understand this. If someone
11 wanted to get a license to Microsoft's H.264
12 standards-essential patents, could they get that license from
13 the MPEG LA pool?

14 A Yes. Anyone could get a license. And the rates were
15 standard rates, and anyone who wanted it was able to get one.

16 Q Now, does Microsoft receive money back in return for
17 licensing its patents through that pool?

18 A Yes, we both pay and receive money back from the pool.

19 Q Let's take the first one, how much money Microsoft gets.
20 How much money does Microsoft get for its H.264 patents
21 annually from all of the licensees of that pool?

22 A It is between 8- and \$9 million a year.

23 Q And you told us Microsoft also is a licensee. What does
24 that mean in terms of getting patent rights? What patents
25 are those?

1 A That means that we get the benefit of a license on all of
2 these over 2,000 patents from all of these companies, and we
3 pay for that around \$13 million a year.

4 Q Now, did you consider that as a point of reference when
5 you were looking at the Motorola letters?

6 MR. PRICE: Objection. Leading.

7 THE COURT: I was just going to -- Thank you. It is
8 leading. Let's stop doing it.

9 By Mr. Pritikin:

10 Q All right. What, if any, bearing did the arrangements
11 that Microsoft has with the pool have on your thinking about
12 the Motorola H.264 offer?

13 A Well, there was this entity that was licensing these
14 patents. And there was an objective point there. To me, it
15 is a way of having a sanity check to be able to determine
16 sort of the general area in which royalties in the field are.

17 Q Now, was it common for Microsoft to receive license offers
18 from other companies on non-standards-essential patents?

19 A Oh, yes. We get them all the time. We might get one a
20 week.

21 Q Was it common for Microsoft to receive license offers from
22 other companies on standards-essential patents?

23 A No. That is very rare.

24 Q When Microsoft receives a license offer from an operating
25 company, not a patent troll, an operating company, what --

1 THE COURT: Counsel, why don't you explain what a
2 "patent troll" is?

3 By Mr. Pritikin:

4 Q Maybe we should stop there. Could you explain to the jury
5 what a patent troll is?

6 A Yeah. It is a name that typically is associated with a
7 company whose whole business model is to acquire patents and
8 then sue people on them. They don't have an actual product
9 which the patent protects. Their business is to own the
10 patent and to sue others to try to get money for it.

11 Q Let me come back to the question. When Microsoft receives
12 a license offer from an operating company, what do you
13 typically do?

14 A Well, assuming there is no litigation or threat of
15 litigation with that company, we look at the letter, you
16 know, we consider who the company is, the patents that might
17 be involved, and then we might in some cases respond to them
18 on whether we have interest or not, or in some cases that may
19 actually evolve into a licensing or cross-licensing
20 discussion.

21 Q Let's put the timeline up again. Let's talk about when
22 this lawsuit was filed. If we look at the entry day 20,
23 "Microsoft sues for breach of RAND commitment and royalty
24 accounting." Can you confirm that Microsoft filed this
25 lawsuit on November 9th, 2010?

1 A Yes, we did.

2 Q Did you make a counteroffer to the Motorola letters before
3 this lawsuit was filed?

4 A No, we did not.

5 Q Why not?

6 A Well, it was very clear from looking at the letters that
7 the letters were not intended to elicit a negotiation, that
8 the purpose of the letter was to clear the way for Motorola
9 to file litigation that they said they were going to file.
10 And the royalty demands were so outrageous on their face that
11 we felt it was really important to have an objective
12 determination of what RAND would be, done by someone who
13 would look at it in a non-biased way.

14 Q After the complaint was filed, how did you expect the RAND
15 royalty rate would be determined?

16 A Well, we had asked the court to determine the RAND, so I
17 expect the court would determine what a RAND rate would be.

18 Q And did the court in fact do that?

19 A Yes, it did.

20 Q Is Microsoft seeking money damages in this case?

21 A Yes, we are.

22 Q Are there any other reasons why Microsoft filed this
23 lawsuit?

24 MR. PRICE: Objection. Lack of foundation. It seems
25 to go under privilege.

1 THE COURT: Sustained.

2 By Mr. Pritikin:

3 Q Is there anything else besides money that Microsoft is
4 asking for in this case, sir?

5 A Yes. First of all --

6 MR. PRICE: Objection. Lack of foundation. It goes
7 to privilege.

8 THE COURT: I think he can answer that question. I
9 will overrule your objection.

10 THE WITNESS: First of all, we have a responsibility
11 to the company to make sure, if the company is injured by
12 somebody else, that we actually get the damages. But there
13 is actually a broader principle at stake here. As I said,
14 this is not just a question of one standard or one company
15 with patents on one standard. The principle that is at stake
16 here really has to do with the way the standard system works.
17 If people can breach their contract obligation with standard
18 organizations and with others that they will license on RAND
19 terms, then that would really make it impossible for
20 companies to be able to rely on those RAND promises, and
21 would put companies in the position where they would be
22 reluctant to implement those standards, because later on they
23 can be subject to a crippling injunction where they can't
24 sell their most important products.

25 For us, this is a really important issue, that people that

1 violate the promises they make, and the contracts they make
2 with others in the context of standard setting processes,
3 they need to be accountable for them. And they have to be
4 able to comply -- they have to be forced to comply with it so
5 that the others are able to rely on those promises.

6 By Mr. Pritikin:

7 Q What was the geographic scope of the licenses that had
8 been offered by Motorola?

9 A It was a worldwide license.

10 Q And if you did not accept the offer, where did you expect
11 that Motorola would sue?

12 A Anywhere --

13 MR. PRICE: Objection. Speculation. Irrelevant.

14 THE COURT: I think he can give his statement as to
15 where. It is overruled.

16 THE WITNESS: The list of patents that were attached
17 to the letters showed patents and patent applications in
18 many, many countries around the world. The reality was they
19 could sue us anywhere and everywhere.

20 By Mr. Pritikin:

21 Q Now, let's look back at the timeline, PDX 2, for a moment.
22 Beginning on the 21st day, after the October 21 letter, did
23 Motorola begin filing lawsuits against Microsoft on
24 standards-essential patents?

25 A Yes, it did.

1 Q Now, there has been testimony already on where the suits
2 were, but let's just run through it quickly. On day 21, was
3 there a lawsuit filed that involved 802.11 and H.264 patents?

4 A Yes.

5 Q And then on November 22nd, was a lawsuit filed in the
6 International Trade Commission, the ITC, concerning Xbox, on
7 802.11 and H.264?

8 A Yes.

9 Q And then in July of 2011, was there a lawsuit filed in
10 Germany involving Windows and Xbox and H.264?

11 A Yes.

12 Q Were you aware at the time that Motorola was seeking
13 injunctions based on its standards-essential patents in those
14 lawsuits?

15 A Yes, I was.

16 Q And can you explain to the jury what the consequences of
17 an injunction on standards-essential patents, 802.11 and
18 H.264 would have been?

19 A Would have been crippling consequences, because you are
20 talking about a standard that has been implemented in a
21 personal computer or another computing device that people
22 expect will be there. People wouldn't buy a computer that
23 doesn't have WiFi. People wouldn't have a computer that
24 wouldn't be able to play back high-definition video. These
25 are things that people have come to expect. And unlike the

1 case of a nonstandard-essential patent -- In the case of a
2 standard-essential patent, like H.264 and 802.11, you really
3 cannot design around the standard. You either have it or
4 don't have it. If the patents are essential, then that's
5 what it means, to be essential. There is no way around it.
6 You have to have it. So it was really a choice of having a
7 product that had such a degraded experience that nobody would
8 like to buy it, or not dropping it and then be blocked by the
9 courts from being able to sell the product in the
10 marketplace.

11 Q After the lawsuits were filed in November of 2010, did you
12 have any further discussions with Mr. Dailey about a
13 resolution of the dispute?

14 A Yeah, we had multiple discussions in that time period.

15 Q Have you had conversations with him over the last couple
16 of years from time to time?

17 A Yes.

18 Q When was the last time you talked to him?

19 A Probably in the last couple of months.

20 Q Let me focus first on that period of time right after the
21 lawsuits were filed, the November/December 2010 timeframe.

22 Can you tell us, briefly, about the nature of your
23 discussions with Mr. Dailey during that period?

24 A Yes. In November and December, Mr. Dailey and I had
25 multiple conversations trying to determine what shape would a

1 resolution to the litigation take. So we started to exchange
2 proposals on what patents would be covered, what scope of
3 products would be covered, what products wouldn't be covered,
4 what royalties would be, and terms and conditions like that.

5 Q And at that time what position did Motorola take regarding
6 licensing its H.264 and 802.11 essential patents for Windows?

7 A Well, that was one of the oddest things, which is they had
8 sent this letter. They had filed some of these cases
9 already. And yet in the discussions with us they were
10 telling us they didn't want to license those patents to us.
11 So they were consistently putting an exclusion in the scope,
12 saying that Microsoft would not get a license for its Windows
13 products on H.264 and 802.11. And obviously we pushed back
14 on that and we insisted that we were -- you know, they were
15 now seeking injunctions, and a resolution, we expected, would
16 involve a license to those patents.

17 Q Now, during this period, over this last two-year period,
18 was there concern expressed to you at Microsoft about the
19 injunctions that Motorola was seeking on its
20 standards-essential patents?

21 MR. PRICE: Objection. Hearsay.

22 THE COURT: Sustained.

23 By Mr. Pritikin:

24 Q Let me ask you directly, were you concerned about the
25 threat of injunctions?

1 MR. PRICE: Objection. Irrelevant, given its
2 position. Not in litigation.

3 THE COURT: Overruled.

4 THE WITNESS: I was very concerned about this.
5 Remember, this is a situation in which you are being told
6 that these portfolios of patents are going to be used in
7 order to stop you from selling your franchise products. This
8 is the livelihood of the company when you think about
9 Windows. So there was tremendous concern. Everyone I would
10 talk to, including the executives that were in charge of
11 these product groups, were incredibly anxious about --

12 MR. PRICE: Objection. Hearsay. Move to strike,
13 your Honor.

14 THE COURT: Ladies and gentlemen, a quick primer on
15 hearsay. A witness, subject to a whole lot of different
16 exceptions, can't say what someone else said. That person
17 can testify, or there can be an exception. The first part of
18 the witness' answer when he is talking about his feelings,
19 his understanding, that is not hearsay. When he begins to
20 say "someone told me," that is hearsay, and I am sustaining
21 Mr. Price's objection.

22 Please ask a fresh question, counsel.

23 By Mr. Pritikin:

24 Q Did the threat of injunctions have any bearing on what you
25 were willing to consider doing vis-à-vis Motorola in the

1 licensing discussions?

2 A Yeah, in a situation like that, the threat of the
3 injunction makes you be prepared to agree to things and
4 accept terms that under normal circumstances you wouldn't
5 have to, because the risk associated with an injunction is
6 just so large for the company that you are going to do
7 everything in your power to try to avoid that risk.

8 Q And was the concern focused on the standards-essential
9 patents in the injunctions or on something else?

10 A It was mostly the standards-essential patents because the
11 other non-standards-essential patents in the litigation, we
12 felt we could design around them; that is, we could find
13 other ways of adding the same functionality that did not
14 infringe their patents. Worst case scenario, you could just
15 drop the feature, and then your product could be sold. But
16 when it comes to a standard like H.264 or WiFi, you really
17 either have it or not have it. And the option of having a
18 computer, as I said, that can't connect to WiFi, can't
19 display video is really not realistic. There is not in the
20 real world an alternative to supporting a standard that is
21 used by everyone all over the world, and in the case of video
22 is used by 80 percent of the high-definition video that
23 people consume on the web.

24 Q Now, as you look back over it in the last couple of years,
25 while the litigation has continued and you had discussions,

1 did you consider these typical patent licensing negotiations?

2 A There was nothing typical about these licensing

3 negotiations.

4 Q And why is that?

5 A Well, first of all --

6 MR. PRICE: I will object. It is ambiguous and calls

7 for a narrative.

8 THE COURT: Overruled.

9 THE WITNESS: This is a negotiation that starts with

10 an improper demand in which a party is leveraging the power

11 that comes from patents that read on a standard. And they

12 are using the power that comes from the fact that the

13 technology has been built into a standard and now is

14 ubiquitous and is absolutely essential for everybody to use

15 it. So in that context, you cannot call that a typical

16 negotiation. You are basically negotiating over a barrel.

17 By Mr. Pritikin:

18 Q Was the threat of an injunction based on

19 standards-essential patents in Germany eventually removed?

20 A Yes, it was.

21 Q And how did that come about?

22 A Well, it was only removed by the actions of this court and

23 the Court of Appeals of the Ninth Circuit.

24 Q I would like to direct your attention to Exhibit 7252. I

25 believe it is in the notebook.

1 MR. PRITIKIN: I believe this is already in evidence,
2 your Honor.

3 By Mr. Pritikin:

4 Q And is this -- Do you recognize this as a letter dated
5 August 1st, 2011, written by David Kaefer to Mr. Dailey?

6 A Yes.

7 Q Does Mr. Kaefer work for you?

8 A Yes, he does.

9 Q And have you read this letter?

10 A Yes, I have.

11 Q Does this letter relate to --

12 THE COURT: Mr. Pritikin, stop for a minute.

13 Mr. Price, do you think 7252 has been admitted?

14 MR. PRICE: I think it has, your Honor.

15 THE COURT: All right. If it hasn't before, it is
16 now.

17 By Mr. Pritikin:

18 Q Did this letter relate to Motorola's -- offer a license
19 Motorola's -- Excuse me. Did this letter offer a license to
20 Microsoft's H.264 patents?

21 A Yes. It was an offer from Microsoft to Motorola, where we
22 were offering to license our H.264 portfolio.

23 Q And can you explain what the effective royalty rate was
24 that you were offering to Motorola in this letter?

25 A Yes. There is a low royalty rate that is cited in the

1 second paragraph, but then you also have a cap associated
2 with it. So for all intents and purposes, for a company the
3 size of Motorola you were looking at an annual royalty of
4 \$585,000.

5 Q Did you think at the time that the rates that were being
6 offered exceeded RAND?

7 A No, I didn't believe them to exceed RAND.

8 Q And how do the rates that you were offering Motorola
9 compare with the rates that Motorola had asked Microsoft to
10 pay in its October 2010 letter?

11 A Well, their demand of royalties to us was for an annual
12 payment of \$4 billion. Our demand royalty to them under this
13 letter was \$585,000. And I should say, this essentially
14 would have put them in the same position as the other
15 companies that were part of the patent pool. We basically
16 offered them the same terms that the other companies that
17 held patents in the patent pool were getting from us, the
18 same rates that they could get a license from us on that
19 technology.

20 Q And did the offer include reciprocity on both companies'
21 H.264 patents?

22 A It did. Although in this case the reciprocity meant that
23 we were willing to pay them RAND. So we were not asking for
24 a grant-back for free of their patents, we were offering them
25 that we would also take a true RAND license on their patents.

1 Q Did Microsoft ever sue Motorola based on its H.264
2 standards-essential patents?

3 A No.

4 Q Now, did there come a time when Microsoft received a
5 response from Mr. Dailey to this letter?

6 A I believe there was one, yes.

7 Q Would you turn, please, but don't display this yet, to
8 Exhibit 7254 in your notebook. Can you identify this as the
9 response that was sent to Mr. Kaefer by Mr. Dailey on
10 August 19th, 2011?

11 A Yes.

12 MR. PRITIKIN: Your Honor, we would move the
13 admission of 7254.

14 MR. PRICE: No objection.

15 THE COURT: 7254 is admitted and may be published.

16 (Exhibit 7254 admitted.)

17 By Mr. Pritikin:

18 Q Did Motorola accept the offer that you had made on the
19 H.264 patents?

20 A No, they did not.

21 Q I would like to direct your attention to a sentence that
22 is in the middle of the long paragraph here. It begins, "We
23 note that" -- the sentence says, "We note that in view of the
24 extensive litigation between the parties, it may not make
25 sense for the two companies to enter into an H.264 license

1 without also addressing the rest of the disputes." What was
2 your reaction to that, sir?

3 A So they were basically saying --

4 MR. PRICE: Objection. That is calling for
5 speculation, characterization.

6 THE COURT: Overruled. He can testify to his own
7 response. You may answer, sir.

8 THE WITNESS: What they are saying is that they will
9 not grant us a license on H.264. First of all, they had made
10 a commitment to the standards organization that they would
11 license it to anybody who asked for it. But they were saying
12 they wouldn't do it unless we agreed to give them a license
13 on our patents that had absolutely nothing to do with the
14 H.264 standard. So essentially they are conditioning -- they
15 are offering a RAND obligation on H.264 on obtaining
16 concessions on things that are unrelated to it. I think that
17 is one of the casebook definitions of what hold-up is about.
18 By Mr. Pritikin:

19 Q Now, I want to jump forward in time. You are aware that
20 there was a trial in November of last year in which the court
21 heard evidence on what a RAND royalty was?

22 A Yes.

23 Q And did you have a further conversation with Mr. Dailey in
24 December of 2012, after the trial?

25 A Yes.

1 Q And in that conversation did Mr. Dailey tell you what
2 royalty rate they wanted for their H.264 and 802.11 patents
3 at that time?

4 A Yes.

5 Q What did he tell you?

6 A It was 2.25 percent.

7 Q Now, are you familiar -- You have used this term. Are
8 you familiar with the term "hold-up" in the context of
9 standards-essential patents?

10 A Yes, I am.

11 Q And what is your understanding of hold-up?

12 MR. PRICE: Objection, your Honor. That is
13 irrelevant. It questions a legal term.

14 THE COURT: I will sustain.

15 By Mr. Pritikin:

16 Q Do you have an understanding, based on your own experience
17 involved in patents, whether a patent owner of the 802.11 or
18 H.264 patents -- of what a RAND royalty is?

19 A Yes. I mean --

20 MR. PRICE: I will object again. His definition is
21 irrelevant.

22 THE COURT: I am going to sustain the objection. I
23 didn't understand what the question was.

24 MR. PRITIKIN: Let me try it again, your Honor, and
25 see if I can do better.

1 By Mr. Pritikin:

2 Q As you look back on the last three years since you
3 received the letters, the original letters, did any actions
4 or statements by Motorola suggest to you that Motorola wanted
5 to grant a license to its H.264 and 802.11 patents on RAND
6 terms to you?

7 A No.

8 MR. PRICE: Objection. That's leading, your Honor.

9 THE COURT: Overruled.

10 THE WITNESS: No, I don't believe they have. I think
11 their actions, you know, are --

12 MR. PRICE: Objection, your Honor. It is now beyond
13 the scope of the question.

14 THE COURT: That's true. Sustained. The first part
15 of the answer stands. Ask another question, counsel.

16 By Mr. Pritikin:

17 Q What did you understand to be Motorola's ultimate business
18 objective in the conversations that you had?

19 MR. PRICE: Objection. Speculation.

20 THE COURT: Overruled. The question has been placed
21 into evidence.

22 THE WITNESS: Motorola actually, throughout our
23 engagement over the last few years, has made it very clear
24 that their goal was to try to obtain a license to Microsoft's
25 patent portfolios in which they didn't have to pay anything.

1 So their objective was to try to get to a point where they
2 would get a free license to Microsoft's 70,000-strong patent
3 portfolio.

4 By Mr. Pritikin:

5 Q And how did the standards-essential patents, 802.11 and
6 H.264, play into that?

7 A Well --

8 MR. PRICE: Objection. Speculation.

9 THE COURT: Overruled.

10 THE WITNESS: I think the August 19 letter is quite
11 on point on this. They are basically saying that they are
12 refusing to grant us the license on RAND terms on H.264, but
13 they are obligated to grant us, unless we also reach
14 agreement on terms that are acceptable to them on everything
15 else.

16 MR. PRITIKIN: No further questions, your Honor.

17 THE COURT: All right. Mr. Price, you stood up, so I
18 am assuming you are doing the questions.

19 MR. PRICE: That's correct. He who makes the
20 objections does the exam.

21 THE COURT: You are going to have about 14 minutes,
22 and then we will take a break.

23 MR. PRICE: I might lose track of time. I'm sure you
24 will remind me.

25 CROSS-EXAMINATION

1 By Mr. Price:

2 Q Good afternoon, Mr. Gutierrez. Let me quickly call your
3 attention to Exhibit 7254, which you were talking about.

4 This is the August 19th, 2011 letter.

5 A Yes.

6 Q And prior to looking that -- If we could maybe put that
7 in context. Can you put up the timeline, please? And so at
8 this time in August of 2011 you --

9 THE COURT: Stop. Mr. Price, hold it for a second.
10 Ladies and gentlemen, we have another timeline, another
11 demonstrative exhibit. It is not an exhibit. Thank you,
12 sir.

13 By Mr. Price:

14 Q Maybe this timeline is not terribly helpful. I just
15 turned off the screen. It goes up to the time of the filing
16 of the lawsuit in Germany. Do you see that?

17 A Yes.

18 Q And so at the time of this letter in August there had
19 been -- you will agree there was a lot of litigation, claims
20 made among the parties on various patents, correct?

21 A Yes.

22 Q And at this time is it fair to say that there was some
23 litigation attorneys involved in the communications between
24 the companies?

25 A Well, my communications were primarily with Mr. Dailey

1 directly. I don't believe I ever spoke to outside litigation
2 attorneys.

3 Q Let me try to be more specific. That wasn't clear. If
4 you look at the letter before that that you looked at, 7252,
5 which was a letter dated August 1st, 2011, to Mr. Dailey from
6 Mr. Kaefer, I believe it is, was an attorney involved - a
7 litigation attorney, someone who knew about these lawsuits -
8 involved in drafting that letter?

9 A I don't know that.

10 Q Well, you just testified about the letter and about the
11 offer here. Do you know whether or not someone who was
12 involved in all of this litigation was involved in the
13 letter?

14 A I don't know that for sure, no.

15 Q Well, were you involved in the letter?

16 A I remember seeing the letter. But you are asking me was
17 there a litigation attorney involved in the preparation of
18 the letter. There might have been, but I really don't know
19 that for sure.

20 Q You don't know if were you involved in drafting the
21 letter, and you don't know if somebody on the litigation
22 team, after all of these lawsuits, was involved?

23 A I am a little confused. You are talking about
24 Exhibit 7254? That's a letter from Motorola to us.

25 Q I am talking about 7252.

1 A Okay. I'm sorry.

2 Q I think that's what you are answering about?

3 THE COURT: No, he is talking about 52.

4 By Mr. Price:

5 Q 7252, the one that was written by Mr. Kaefer. Someone in
6 litigation was involved in drafting this letter?

7 A There was probably someone who saw the letter. If you are
8 asking me do I know that for sure, I really don't. But I
9 think in the situation that we were with Motorola, it is
10 reasonable that someone in litigation might have been
11 involved in this.

12 Q So it is reasonable to think when these letters were
13 drafted at this time, they were drafted, in part, basically
14 to make a record to be presented later, if necessary?

15 A Well, this letter was drafted to make an offer on RAND
16 terms on the license, which Motorola could have accepted. It
17 was a valid offer on behalf of Microsoft.

18 Q But my question is a little different. The crafting of
19 the letter was done in a way that later, if it were
20 presented, it could be presented in a nice way, it could be
21 used?

22 A I don't know how to answer that. You are asking me to
23 speculate what was in people's minds. We intended to make an
24 offer for a license of this portfolio on terms that we felt
25 were clearly within the bounds of RAND. That's what we did.

1 You know, there was a number of different things that could
2 have happened. It could have been accepted or it could not
3 have been accepted. If it was not accepted, you know,
4 obviously that might possibly end up in the record of
5 litigation like this one.

6 Q And because this letter might end up in litigation like
7 this one, there was an attorney involved in putting those
8 words in the letter, right?

9 A I cannot tell you. I honestly cannot say who drafted the
10 words in this letter. And your question would have me say
11 that I know there was a litigation attorney drafting it. I
12 think it is fair to assume there was at least a litigation
13 attorney reviewing it.

14 Q At this time now in August of 2011 -- Now, there has been
15 some testimony, in September of 2011 Microsoft said it would
16 accept a RAND rate, you are aware of that?

17 A I'm not sure about the significance of the September date,
18 but we had over a very extended period of time told Motorola
19 that we would be prepared to pay fair compensation for a
20 license under their portfolio.

21 Q My question was different. When Microsoft first said that
22 it would be willing to accept a RAND rate for Motorola's
23 patents, that was sometime around September of 2011, correct?

24 A I don't believe so. I really don't think so. That might
25 have been the first time it was said in the context of the

1 litigation. But when we filed this breach of contract action
2 and we were asking the court to set an accounting of what a
3 RAND rate would be, obviously we would take the license on
4 RAND rate. We had been open to taking reasonable licenses
5 from Motorola from the very day of October 1st, 2010 when we
6 filed the action. That was the first thing that we said to
7 Motorola.

8 Q Actually, sir, the words, "we are willing to accept a RAND
9 rate," those are fairly easily written down or articulated,
10 correct?

11 A Yes.

12 Q It would be very easy to write down on a piece of paper,
13 "we will accept a RAND rate"? "We will pay Motorola a RAND
14 rate," you can do that in five seconds, right? Correct?

15 A Yes.

16 Q The first time that was ever done verbally or in writing
17 was in September of 2011, correct?

18 A I don't know that for sure.

19 Q But you do know that there have been observations in this
20 courtroom, in connection with motions, that that is in fact
21 the first time that was ever stated?

22 A I'm sorry, but I am personally not aware of those motions
23 and those discussions, so I really can't tell for sure.

24 Q Well, what you do know is that prior to there being some
25 discussion about Microsoft being able -- being willing to pay

1 a RAND rate, that prior to that time, in the negotiations you
2 actually took part in, the terms that you offered, "you"
3 meaning Microsoft, for Motorola's patents, those rates were
4 less than the rates determined by this court as RAND rates,
5 correct?

6 A I'm not sure which communication you are talking about
7 now. There is a lot of references to specific things that
8 were said in specific settings. I am not seeing a document,
9 and I'm not sure that I have the kind of memory that would
10 allow me to say, yes, on this date we said this, especially
11 if the statement didn't come from me.

12 Q No, this is a different question. I am off of when you
13 said we will pay a RAND rate. I am talking about, when you
14 are talking specific rates -- And you had exchanges with
15 Motorola about specific rates that Microsoft was willing to
16 pay on the essential patents, right?

17 A Yes.

18 Q And in those exchanges, when you gave specific rates,
19 those rates were all lower than the RAND rate which this
20 court later determined was appropriate?

21 A I don't think it is accurate to say that they were all
22 lower than the rates determined by this court. I'm not
23 certain that that is the case. But there might have been in
24 the course of the conversations different rates that were
25 offered.

1 Q The economic terms of the licenses that Microsoft told
2 Motorola it would agree to were all below the rate that the
3 judge found to be RAND in this case, correct?

4 A The part that I am having trouble with - and I am really
5 not trying to be difficult, I want to answer - is, you are
6 saying the terms we offered were "all" below. And I am just
7 having trouble being able to say for sure that at all times
8 rates that were offered were below.

9 Q Let's just go with your recollection then. Your
10 recollection is -- It may not be perfect. Your recollection
11 is that the economic terms Microsoft offered to pay Motorola
12 on the standards-essential patents were all below the rate
13 that the judge found to be RAND in this case?

14 A I'm really sorry to do this. But if you are talking about
15 a specific offer or proposal that we made at some point, it
16 would really help me to be able to see it. In a vacuum it is
17 hard for me to be able to say yes. Are you saying this was
18 an offer I made?

19 MR. PRICE: Your Honor, at this point if I could play
20 from the May 24th, 2013 deposition, pages 180.15 to 181 -- I
21 think it is 181.15?

22 MR. PRITIKIN: Your Honor, I don't think there is
23 anything inconsistent in here. The questions Mr. Price was
24 asking were about whether all of the offers that were made in
25 the back and forth were below RAND. This is consistent with

1 that. He said there was --

2 THE COURT: I don't have a copy of the deposition,
3 counsel.

4 MR. PRICE: I'm sorry. I thought you did.

5 THE COURT: Ladies and gentlemen, we are going to
6 send you out to take your break. I will spend my break
7 sitting here answering this question. Let's see if we can
8 use yours in a better use of time. Please rise for the jury.
9 (At this time the jury left the courtroom.)

10 THE COURT: Mr. Price, is there a copy --

11 MR. PRICE: There is a binder we gave you. I think
12 it has copies of two days of depositions.

13 THE COURT: Where are we looking? Which day --

14 MR. PRICE: In the back of the binder. This is
15 May 2013. It is the last half.

16 THE COURT: Page?

17 MR. PRICE: Page 180, Line 15 to 181, line 15.

18 THE COURT: All right. I will permit that question
19 when we come back. We will be in recess until 3:15.

20 (Recess.)

21 THE COURT: Please bring the jury in.

22 (The following occurred in the presence of the jury.)

23 THE COURT: Mr. Price.

24 Q Now, page 180, line 15.

25 THE COURT: Let's read it.

1 Counsel, I asked to you please read it.

2 MR. PRICE: I will.

3 Q "Question: So -- and that's the only context in which
4 Microsoft has made an unconditional offer to pay RAND rates
5 on the patents that Motorola has identified as standard
6 essential, is the only context the representations to the
7 court in this action?

8 "Answer: I hate to make this complicated, but there
9 might have been an exchange of correspondence in a
10 negotiation in which we proposed that we would pay RAND rates
11 on these portfolios independent of the rest of the patent
12 portfolio between the two companies.

13 And those negotiations actually never resulted in an
14 agreement because the terms that we were willing to do that
15 were not acceptable to Motorola.

16 "Question: Were those -- in that context did Microsoft
17 identify what specific rate it was willing to pay or did it
18 tie it to something the court was going to do?

19 "Answer: I believe we did identify what the economic
20 terms of that license would be.

21 "Question: Okay. And were those economic terms within
22 the range of RAND rates that the court has now identified?

23 "Answer: I think the rate we offered was below the
24 rate that the judge found to be RAND in this case."

25 And, Mr. Gutierrez, going to Exhibit 7254, which you

1 were talking about. This is the August 19, 2011 letter from
2 Mr. Kaefer -- to Mr. Kaefer from Mr. Dailey.

3 And first, are you aware that, in the context of the
4 rules of this trial, that Mr. Dailey may not be recalled
5 unless good cause is shown?

6 A I was not aware of that.

7 MR. PRITIKIN: Objection. Relevance, Your Honor.

8 THE COURT: I'm going to sustain the objection to
9 that. I think that's for the court to advise.

10 MR. PRICE: Very well, Your Honor.

11 Q So if we go to 7254, you've given us some testimony on
12 your understanding of Mr. Dailey's e-mail of August 19, 2011.
13 Do you see that?

14 A Yes.

15 Q If we can blow up the third paragraph there. Because you
16 were talking about your understanding of this, saying that
17 you had not been given an H.264 license. You were testifying
18 about that, correct?

19 A Correct.

20 Q And it's correct that, in fact, earlier, as early as
21 October and November of 2010, you were saying that Microsoft
22 wanted an overall resolution where all the patents were put
23 on the table, correct?

24 A Yes.

25 Q So here we have some representations. Is it true that as

1 of this date Microsoft and Motorola were involved in patent
2 infringement lawsuits in several places regarding claims, by
3 each company, of that infringement?

4 A Yes.

5 Q Is it true there had been settlement discussion since late
6 2010? And that, in fact, there was a mediation under the
7 guidance of former Magistrate Judge Edward Infante of the San
8 Francisco office of JAMS, the dispute resolution service?

9 A Yes.

10 Q And was Magistrate Infante, after that date, still
11 overseeing discussions among the parties?

12 A Very briefly, and for -- for a short period of time, yes.

13 Q And then it says, "Accordingly, we should consider whether
14 it is more appropriate for Microsoft's H.264 offer and
15 further negotiations regarding that offer to be included
16 within these overall discussions to resolve all of our
17 companies' disputes." Do you see that?

18 A Yes.

19 Q And you had said the same thing to Mr. Dailey back in
20 October and November when you said, we want all the patents
21 on the table so that we can resolve all of these disputes and
22 not have to sue each other serially, correct?

23 A Yes. But there's a significant difference in their
24 position and ours. And it is that they were suing us and
25 seeking injunctions on H.264 standards-essential patents.

1 And they have a contractual obligation to license those to
2 anyone who asks for a license. The patents that we were
3 litigating on were not H.264 or 802.11. So we didn't have
4 that obligation. So, at this point there had been an offer
5 to license and cross-license specifically H.264. And he was
6 refusing to grant us that license, pending some broader
7 resolution. At that point we were prepared to do a
8 cross-license of all that. That's the purpose of the
9 August 1st letter.

10 Q So that would obviously have been true in October after
11 you had been sued by Motorola and their request for
12 injunctive relief in this court, and at the ITC. That same
13 reasoning would apply in November of 2010, right?

14 A I think the answer is yes.

15 Q And in November of 2010, what you said was: We will only
16 do a resolution if you put all your patents on the table, we
17 put all our patents on the table, and we come to one overall
18 resolution. That was your position in November 2010,
19 correct?

20 A Yes. Our goal was to try to find an overall resolution.
21 The question here is whether, once the conversations have
22 evolved to the point when there is a request for a license
23 only on H.264, they can refuse to grant that license unless
24 there is a license on something else. And that's the part
25 where their obligations to standards organizations are

1 different than ours on patents that have nothing to do with
2 standards.

3 Q Okay. If that was your belief when you saw this letter,
4 that the circumstance had changed, that you had changed your
5 position that there should be an overall resolution, then
6 obviously there's going to be a letter back reviewed by an
7 attorney saying, wait a minute, there's a difference, you
8 can't say we need to resolve all of this together. Obviously
9 that exists, right?

10 MR. PRITIKIN: I would object to that question, Your
11 Honor.

12 THE COURT: On what basis?

13 MR. PRITIKIN: I'm not sure I understand the
14 question. But, foundation.

15 THE COURT: I'll overrule the objection.

16 A Well, I don't know --

17 Q That means you can answer.

18 THE COURT: He's now going to answer, counsel. Don't
19 start a new question, please.

20 A So we made an offer to them to license our H.264
21 portfolio, and to take a license to their H.264 portfolio.
22 They responded saying no. I don't know that there is
23 necessarily follow-up correspondence that needs to happen
24 after that. We've said we wanted it. We were prepared to
25 offer a rate that was, I think, what we felt was an

1 objective, fair rate on those, and be willing to pay RAND.
2 They told us no. And it was very clear they were not
3 prepared to grant us that license. They said that black and
4 white in the letter.

5 Q Therefore it says, if you look at this, it says that,
6 "After all, we are sure that Microsoft would agree" -- after
7 all -- "that no two companies would reasonably wish to
8 resolve part of a dispute and yet have to continue to pay
9 substantial litigation costs in connection with unresolved
10 parts of that dispute."

11 Now, just looking at that where Mr. Kaefer -- Mr.
12 Dailey is saying, "We assume you would agree with this." And
13 let's divide that out. First of all, you agreed with that in
14 November when you said you wanted everything resolved at
15 once, right?

16 A Yes.

17 Q So this now says, Mr. Dailey says, we assume you would
18 agree with this; you see that, correct?

19 A I do.

20 Q And what you're telling the jury now is that you thought
21 this letter alone amounted to a violation of a RAND
22 commitment, correct?

23 A Absolutely.

24 Q And that you were upset about this. You were outraged by
25 this?

1 A I thought it wasn't right.

2 Q Okay. So if you think it's not right and Mr. Dailey is
3 saying we're sure you would agree that no two companies would
4 want to resolve some but not all, and you know that, in fact,
5 had been your position for all those months since November,
6 if that's what you really thought, do you think you would
7 have sent a letter saying, "Things have changed. I don't
8 think that. You're wrong?"

9 A No. No, I wouldn't. I mean, the reality is when we sent
10 the letter making that offer, you know, there was always a
11 possibility that they wouldn't accept it because they were
12 more interested in maintaining the threat of this injunction
13 hanging over our head. And this is just consistent with
14 that. We made yet another -- there were many efforts that
15 were made to try to reach a resolution. We made this offer.
16 They said no. It was really -- they were assuming that we
17 would agree and things like that. Clearly we weren't -- we
18 did not agree, that's why we made an offer. And they
19 rejected it. So the way -- to us, in the context it was very
20 clear, they had no intention of granting us that license
21 because they were intent on maintaining the threat of this
22 injunction to try to get us to agree to other things.

23 Q I'll get back to the threat of injunction later. But let
24 me just ask you about -- you said, "The reality." The
25 reality is, there's not a writing anywhere where you sent

1 anything, or anyone at Microsoft sent anything to Motorola
2 saying, no, your assumption is wrong. We actually think
3 there's some breach of your duty not to accept the offer we
4 made the day before. It wasn't the day before, let me get
5 the exact date here. 7253.

6 A A couple weeks before.

7 Q A couple weeks before. So the reality is, there is
8 nothing in writing that reflects your current position that
9 you were outraged and you thought this was, itself, some
10 breach, and that they were mistaken in what Microsoft would
11 want as far as resolving everything. That's the reality.
12 There is nothing in writing that says that?

13 A There is nothing in writing that I'm aware of. That
14 doesn't mean that that wasn't our view of the situation then.

15 Q So, is the first time that you're aware that Microsoft has
16 ever characterized this letter this way, okay, which is that
17 it by itself was some breach of an obligation, was
18 outrageous, is the first time you're aware that Microsoft
19 ever said that, is when you told the jury that in court
20 today?

21 A Well, that is the whole basis of the breach of contract
22 case that we have before this court, is that there's a
23 pattern of behavior that this confirms in which they violated
24 their obligations. This is one of a number of other acts.

25 Q And --

1 THE COURT: Stop. Were you finished?

2 THE WITNESS: Yes.

3 THE COURT: Then you can go.

4 MR. PRICE: Thanks.

5 Q My question was a little different, sir. You today have
6 come in here and told the jury that this letter alone was a
7 violation of a RAND commitment, that it misstated or
8 contained an incorrect assumption as to whether or not
9 Microsoft would want to resolve the case altogether or in
10 parts, and that you were outraged.

11 So I'm just asking, is the first time that those facts
12 were ever revealed as to how Microsoft felt about this
13 letter, is the first time that you're aware that that was
14 ever revealed was today when you testified in front of these
15 eight folks?

16 A You seem to be attaching, in your question, some special
17 significance to this one letter. The way we looked at this
18 is this letter is just one more piece of continued conduct on
19 the part of Motorola that amounts to their breach of their
20 obligations. There is nothing magical about this letter,
21 other than the fact that at that point we were prepared to do
22 an H.264 cross-license. We made the offer. It was not
23 conditioned on resolving anything else. And then they come
24 back and they say they will not accept it unless there is a
25 broader resolution.

1 And as I said, their conduct is subject to a different
2 standard because of the nature of the patents in question.
3 They are obligated to make those patents available to anybody
4 who asks for them. And they don't get to condition it on
5 getting some other value which is unrelated to that standard.

6 Q And, I'm sorry, I'm focusing on your direct testimony.
7 Okay?

8 A Okay.

9 Q And in your direct testimony, I think you told the jury
10 that this letter, alone, was a violation of a RAND
11 obligation, that it was outrageous. And so what I'm
12 asking -- this is a very simple question -- is the first time
13 Microsoft has ever taken the position that you took in your
14 direct, that this by itself was some kind of breach of an
15 obligation, this letter, is the first time that Microsoft has
16 taken that position when you took the stand today and you
17 were asked questions by Microsoft? It's a yes -- I think
18 it's a yes or no question.

19 A I'm not sure it is. What I said is this letter is a clear
20 example of that kind of behavior. You have to just look at
21 the letter and see it from the horse's mouth, right there,
22 that you're conditioning an H.264 patent license on some
23 other license that has nothing to do with it. So, it made it
24 very obvious what the conduct was. I'm not saying that that
25 letter alone is the basis of our contention.

1 Q Okay. So we've clarified that. There is nothing wrong --
2 in a normal context if you had said to Motorola, sent them
3 the letter that we're looking at with the offer on H.264, if
4 you had done that in another context and Motorola had said,
5 look, we've got some other disputes, you know, we want to
6 resolve everything at the same time, we think you do, too,
7 then that would not be a violation of RAND in your mind.
8 It's only part of a pattern. By itself it is not, itself, a
9 violation of RAND. Is that what you're saying now?

10 A I'm saying that you have to look at the context in which
11 this exchange took place. And in the context of this
12 exchange, Motorola was seeking injunctions of H.264. The
13 consequences for us could have been quite significant. And
14 we made an offer on a license and cross-license on these set
15 of patents, and they chose not to honor their obligation to
16 grant us a license on that. That is not embodied just in
17 this letter; that results from the course of our engagement
18 over the last three-or-something years since this has
19 happened.

20 Q Okay. Let me go on and talk about course of conduct. And
21 let me start at the beginning here, if I can. This is
22 October 20, 2010. And let me start this way: You were
23 presented in this case as a 30(b)(6) witness for Microsoft,
24 weren't you?

25 A Yes.

1 Q I'm going to try to explain what that is, which means that
2 you were offered for sworn testimony at deposition on certain
3 topics where you were the person designated to serve as
4 Microsoft's spokesperson, correct?

5 A Correct.

6 Q And one of those topics that you were designated on was
7 how typical Microsoft patent license negotiations proceed,
8 correct?

9 A Correct.

10 Q And so let's talk about these typical negotiations. In
11 the typical negotiations that Microsoft has, Microsoft
12 expects that the other side will come forward with patents of
13 its own so that you can determine a net cash flow. That's
14 how it typically proceeds, correct?

15 A There are many cases that proceed that way. So they
16 wouldn't be uncommon. I wouldn't go as far as saying that
17 every case proceeds that way. And I also have to say there's
18 really nothing typical about the situation that we are in and
19 have been in with Motorola.

20 Q But you don't mind if I ask you about the typical
21 situations, since that was the topic of your deposition,
22 okay?

23 A Yes.

24 Q Okay. So I'm going to use the word "typical" and see if
25 you agree with it. Do you agree that the typical situation

1 is that Microsoft goes to someone and says, you know, you're
2 using our intellectual property, you need a license. That
3 the typical situation is that they respond by saying, okay,
4 here are our patents. That's typical?

5 A In the typical situation, yes.

6 Q And it's typical, then, that the reason they do that is
7 the parties then discuss what will be sort of the net value,
8 which way will things flow, correct?

9 A That's a fairly common scenario in the typical case, yeah.

10 Q It's a typical case?

11 A Yeah.

12 Q Typically, then, what you would expect if you went to
13 someone to say you need to license our patents, Microsoft,
14 you would expect them to come back with the patents that they
15 thought Microsoft should license, correct?

16 A Yes.

17 Q And if those are standards-essential patents, if they
18 think that Microsoft is using that technology, you would
19 expect that party to come back and include, among those
20 patents, the standards-essential patents?

21 A I actually have to say that wouldn't be part of a typical
22 case. I haven't really been in situations in which the
23 response is a standards-essential patent assertion or
24 contention. These tend to be more portfolio-wide
25 cross-licensing discussions, the typical cases.

1 Q The purpose, though, coming forward with the other side
2 with their licenses, is so you can compare value, correct?

3 A Yes.

4 Q And so in comparing value you would expect them to come
5 forward with any patents they think are valuable, so that
6 they can negotiate the best deal for themselves, right?

7 A Yes. And sometimes they do. Sometimes they actually
8 don't follow through with that.

9 Q I'm talking about typically. So you would expect, if
10 someone thinks they have valuable standards-essential patents
11 among their portfolio, that they're going to come back and
12 say, we have standards-essential patents, we have these
13 patents, whatever they think can give them economic value,
14 correct?

15 A You're asking me about the typical case. I'll have to say
16 that is not a typical case where someone comes back with a
17 standards-essential patent portfolio. But would it be
18 logical that someone trying to do a trade would try to look
19 for its patents in the typical case and try to negotiate?
20 Yes. But it is really not common. And, in fact, I can
21 hardly remember a case in which what comes back is a
22 standards-essential patent assertion of that kind.

23 Q Okay. Well, let's go with what you said, which is that
24 given the economic incentives where the licensee, proposed
25 licensee, wants to come forward with their portfolio so that

1 there can be some net result, that logically they would come
2 forward with standards-essential patents and whatever other
3 patents to lay on the table?

4 A As a hypothetical, I'm prepared to say yes to that.

5 Q Logically. I'm using your word, "logical"?

6 A Yeah.

7 Q And obviously, then, if negotiations don't work, sometimes
8 there are lawsuits, right?

9 A Yes. It's relatively rare, but they do happen.

10 Q And in lawsuits, the typical situation is that if you sue
11 somebody saying you have patents and you were trying to
12 exclude them from the market, then they will come back and
13 sue you and say we have patents also. That is what you
14 expect?

15 A Yes. In the typical case, yes. But you're talking here
16 about requests for injunction and standards-essential patents
17 that's preceded by an improper -- improperly high royalty
18 demand.

19 Q We'll get to that. I'm talking about -- let's go to
20 October 1st, 2010. Actually, let's go to September 30, 2010.
21 You know that Microsoft is about to sue Motorola?

22 A Correct.

23 Q You have an expectation that if Microsoft sues Motorola,
24 then if there's no settlement agreement, Motorola will sue
25 Microsoft on patents it thinks are valuable. That's what you

1 would expect?

2 A Correct.

3 Q In fact, prior to suing Motorola, Microsoft did analyses,
4 defensive analyses to try to figure out: If we sue Motorola,
5 what can they sue us back on?

6 A That's correct.

7 Q And that took a significant period of time, correct?

8 A Yes.

9 Q So let's talk about that. You sue Motorola on October 1,
10 2010. So how long was it, then, that Microsoft was
11 implementing a plan to sue Motorola and expecting Motorola to
12 sue back?

13 A I think the whole preparation time took probably a few
14 months. Probably from late spring until when the action was
15 filed.

16 Now, the decision wasn't made that early. The decision
17 was made later in the process. But the analysis that led to
18 the decision started a few months before the action was
19 filed.

20 Q So I'm going to put a timeline in front of you here. So
21 we have October 1, 2010, Microsoft sues Motorola in the
22 Western District of Washington. Do you see that?

23 A Yes.

24 Q And so you're saying that the analysis for suing Motorola
25 and expecting what they're going to sue back on took place,

1 you think, several months before that? You said spring?

2 A I'd say probably the late spring of 2010.

3 Q So late spring, your seasons may be different from mine,
4 I'm not sure. So give me your best estimate.

5 A I'm from the tropics. So maybe April.

6 Q April. So around April 2010 Microsoft is investing the
7 resources to prepare lawsuits against Motorola and trying to
8 figure out what it will get back in a counter-lawsuit,
9 correct?

10 A Yes. I would clarify that we were investing resources in
11 analyzing whether we should bring those cases and what the
12 implications of those cases would be. The decision wasn't
13 made until later. Just to make it clear, the decision wasn't
14 made in April, and it was just a matter of execution after
15 that. That was a level of preparation that takes -- this is
16 not a decision that a company like Microsoft takes lightly.
17 So there's -- it's not something that we do very easily. You
18 have to consider the consequences of doing that. So you
19 absolutely analyze the risk exposure that you might have. So
20 you do that analysis. And then a decision is made. And then
21 you proceed with the litigation.

22 Q And in a typical negotiation context, if you want to know
23 what someone's patents are that they might assert against
24 you, right, you would ask them? Typical context?

25 A Well, let me just -- this may be an area in which maybe I

1 know too much from having done this for so many years. You
2 first look at public sources. Patents are public. You can
3 go to the PT0 website. You can go to the websites of the
4 major countries around the world, and you can find
5 information. And there are tools that people sell where you
6 can analyze their portfolios. So you can get a lot of
7 information on your own.

8 Now, when you're in the process of negotiation, you want
9 the parties to really focus on what is it that is important
10 to them that they be compensated for. And then that's when
11 you ask the other party, what's important to you? What
12 patents do you have in that field? How do we have this
13 discussion? And that's when the focus of the conversations
14 begins to narrow and sharpen its focus.

15 Q But in the context of negotiations, one way to find out --
16 in negotiation time: I have patents that you're infringing.
17 You know, in those contexts you could say to someone, "Tell
18 us what your patents are," which you say you did in this
19 case?

20 A Yes. And in other cases, too.

21 Q And you said, but it wasn't done in this case because
22 negotiations had gone on for more than three years and they
23 failed, and therefore you were getting ready for litigation?

24 A I'm not sure I understand that last part. Will you repeat
25 that?

1 Q Sure. Is the reason you didn't go to Motorola in April
2 and say: We have patents we think you're infringing, and you
3 might want to bring your patents to the table, is the reason
4 because negotiations had gone on for more than three years,
5 and having failed in the attempt to do that Microsoft was
6 focused on getting ready for litigation?

7 A Well, up until that point Motorola had stated to us that
8 they didn't feel there was a need to really reach agreement
9 on the license because they had patents of their own, and
10 that if we were to take any step on that it would amount to,
11 and I quote, "Mutually assured destruction." But they had
12 never really articulated what those were.

13 And in the meantime, you know, we felt that the
14 infringement situation from Motorola's perspective was such
15 that we really couldn't continue to wait indefinitely.
16 That's why we made the decision to file the suit.

17 But also, as I said, the day we filed the suit, we came
18 forward and we told them, we know that you have been saying
19 for a while that you have patents that are relevant to us, we
20 want you to know that we respect that. We know this is a
21 two-way street, and we're prepared to explore resolution that
22 takes care of both sides.

23 Q Sir, the only discussions that have been taking place
24 between Microsoft and Motorola concerning patents prior to --
25 let's say prior to the spring of 2009, up through the summer

1 of 2010 -- up through September of 2010, let's put it that
2 way, up through September 2010, the only discussions that had
3 taken place between Microsoft and Motorola were discussions
4 that were led by a woman named Joy Murray, correct?

5 A Correct.

6 Q And this woman was three levels down from you. Correct?

7 A She was a licensing executive who was part of my team.

8 Q And it wasn't until 2010, late, that you started having
9 discussions with Mr. Dailey about those negotiations,
10 correct?

11 A Correct.

12 Q So you really have no firsthand knowledge about the
13 negotiations between Ms. Murray and Mr. Dailey, correct? You
14 weren't part of those negotiations?

15 A Ms. Murray --

16 Q Yes or no?

17 A It's a technical question. Is getting reports from
18 someone who works for you about the performance of their
19 duties and as part of my management responsibility, having
20 firsthand knowledge? I think it is.

21 Q You're a lawyer, right?

22 A Right.

23 Q You know what hearsay is, right?

24 A Well, yes. I'm not a litigator.

25 Q But you went to law school, right?

1 A Yes. A few times, actually.

2 Q Passed the bar. I'm not going to get into that. And you
3 know when I say "firsthand knowledge" -- in fact, I asked
4 you -- were you present in communications with Mr. Dailey in
5 those negotiations with Ms. Murray?

6 A No, I was not.

7 Q And those negotiations concerned an expired license for
8 ActiveSync, correct?

9 A Correct.

10 Q That was a four-year \$100,000 license that Motorola had
11 between 2003 and 2007, right?

12 A Yes.

13 Q And so the negotiations on that were, again, covered by
14 Ms. Murray, not by you, correct?

15 A Correct.

16 Q And so you've previously testified -- well, is it your
17 position that the reason you did not negotiate before filing
18 a lawsuit is because negotiations had gone on for three years
19 and they had failed, and therefore that's why we focused on
20 getting ready for litigation?

21 A I think our sense was that the negotiations were not going
22 to lead to a resolution of the patent disputes, and that
23 there had come the point where Microsoft needed to enforce
24 its IP to make sure that we would be taken seriously and that
25 the issue would be resolved.

1 Q Let's get this straight, then. I just want to make sure.
2 So the reason you didn't negotiate any further -- or at least
3 didn't negotiate, or ask Motorola "What patents do you have,"
4 before suing, because negotiations involving Ms. Murray had
5 kind of reached their end and Microsoft thought it might have
6 to sue, correct?

7 A Yes.

8 Q That had nothing to do with why Microsoft sued, did it?

9 A I wouldn't say that, no.

10 Q Well, let's fast forward to October, 2010. If you see the
11 timeline, Motorola Droid phones were on the market
12 November of 2009, correct?

13 A Correct.

14 Q And at the time you sued, you didn't just sue on the
15 patents for that ActiveSync that had been part of the license
16 between 2003 and 2007, that four years, you didn't sue just
17 on those patents, did you?

18 A No, we did not. They were part of the litigation, but
19 they were only a part of it.

20 Q They were just a tack-on, right?

21 A No, I'm sorry, I wouldn't characterize them as that.

22 Q You've obviously seen the complaint, correct?

23 A Yes.

24 Q And if we could show you Exhibit 7119. And you recognize
25 that as a complaint that Microsoft filed against Motorola on

1 October 1st, 2010 here in this court, correct?

2 A Yes.

3 Q And if you look at the complaint --

4 MR. PRICE: And, Your Honor, I'd move the complaint
5 into evidence, 7119.

6 MR. PRITIKIN: No objection.

7 THE COURT: It is admitted and may be published.

8 (Exhibit No. 7119 was admitted into evidence.)

9 Q And if we look at the complaint, and let's go to Count 1,
10 infringement of U.S. patent number -- patents are usually
11 discussed by their last three numbers, correct?

12 A Correct.

13 Q So it has this long number, but it would be referred to as
14 the '517 patent, correct? Right?

15 A Yes.

16 Q The '517 patent in Count 1, that was never a patent that
17 was discussed with Motorola prior to the October 1, 2010
18 lawsuit, was it?

19 A I don't believe it was.

20 Q Now, it does relate to Android software, doesn't it?

21 A It relates to functionality that's implemented, we
22 believe, in the kernel of the operating system that's used by
23 Android, yes.

24 Q And you had known, before filing the lawsuit, that
25 Motorola had -- its business commitment was to start making

1 phones that used Android's operating system and not
2 Microsoft's, correct?

3 A Yes, we knew that.

4 Q That's Count 1. Count 2, you see there's a patent there,
5 the; '352 patent, right?

6 A Correct.

7 Q Has nothing to do -- it's not a patent you discussed at
8 all with Motorola prior to filing on October 1, 2010,
9 correct?

10 A Correct.

11 Q So let's go to Count 3. The '746 patent. That's not a
12 patent that Microsoft had ever discussed with Motorola before
13 October 1, 2010, correct?

14 A Correct.

15 Q And go to Count 4 here, that's the '762 patent. Do you
16 see that?

17 A Yes.

18 Q And that's not a patent that Microsoft had ever discussed
19 with Motorola prior to October 1, 2010, correct?

20 A Correct.

21 Q Let's go to Count 5, the '910 patent. That, too, is not a
22 patent that Microsoft had ever discussed with Motorola prior
23 to filing the lawsuit, correct?

24 A Correct.

25 Q And these patents so far are patents which Microsoft

- 1 claimed read-on, covered the Android operating system, right?
- 2 A Yes. But you need to keep going.
- 3 Q And then '376. That patent is not a patent that was
- 4 discussed between Microsoft and Motorola, was it?
- 5 A Correct.
- 6 Q So we're at six patents now. Then we go to seven. '133.
- 7 How about that one?
- 8 A I don't believe this had been discussed.
- 9 Q And we've got seven patents now, and all of them pertain
- 10 to Android operating software, correct?
- 11 A Correct.
- 12 Q And none of them were ever discussed with Motorola prior
- 13 to the lawsuit being filed, correct?
- 14 A Correct.
- 15 Q There are nine patents that are alleged in this lawsuit,
- 16 correct?
- 17 A Correct.
- 18 Q The last two, 8 and 9, relate to ActiveSync?
- 19 A Correct.
- 20 Q And, in fact, prior to October 1, 2010, you didn't contact
- 21 Motorola and say, you know, we're fed up with this, we're
- 22 going to sue you on ActiveSync, did you?
- 23 A Well, we had had a conversations with them that had lasted
- 24 three years in which we had tried to get them to renew the
- 25 license, and they had refused to do so. I think they're a

1 sophisticated company. I think they would understand that
2 their failure to renew the license but continuing to ship the
3 feature in the phone, might result in Microsoft enforcing its
4 IP.

5 Q Well, the details of those were discussions that your
6 associate had, your colleague, right?

7 A Right.

8 Q You've seen the e-mails about those and the request for
9 claim charts. Did you follow those?

10 A I believe I've seen some of them.

11 Q So what happened is that you eventually had a discussion
12 with Mr. Dailey about arranging a meeting for "general
13 counsel to general counsel" to talk about the relationship
14 between Microsoft and Motorola, correct?

15 A Yes. And that wasn't really a patent, intended to be a
16 patent-licensing discussion.

17 Q Right. You did discuss that, in that discussion, that you
18 wanted -- one of the topics you guys wanted to discuss was
19 these ActiveSync patents, correct?

20 A Yeah. And I also mentioned to him in the conversation
21 that another topic that I wanted to talk about is our
22 concerns about infringement by the Android operating system.

23 Q What you said about that was that was just a passing
24 comment, correct?

25 A Yes.

1 Q And that that comment wasn't meant to be a patent
2 assertion at all, correct?

3 A I didn't intend it to be a patent assertion. I just
4 wanted to make him aware that we had patent infringement
5 concerns with respect to that, that we thought if the meeting
6 was going to take place, that should be one of the topics of
7 the conversation.

8 Q Well, and your characterization of this conversation --
9 how long was it? You had this conversation with Mr. Dailey
10 about setting up this meeting.

11 A How long was the conversation itself?

12 Q Yes.

13 A It was a short conversation.

14 Q In this short conversation the only thing that you
15 mentioned concerning Android was a comment in passing that
16 you had concerns, correct?

17 A Yes.

18 Q And then you set up a meeting for general counsel to
19 general counsel, right?

20 A Yes.

21 Q And all the while, while this is going on -- we're now
22 into what period of time in 2010?

23 A This might have been August of 2010.

24 Q Okay. So we've got April, May, June, July, August, five
25 months now Microsoft is looking into suing Motorola in

1 connection with these seven patents that pertain to Android,
2 right?

3 A Correct.

4 Q Of course you didn't tell Motorola, during that timeframe,
5 that you thought they infringed those patents or that you
6 were considering suing them, correct?

7 A Except in this conversation where I told them we had
8 concerns.

9 Q You said -- your passing comment, we have some concerns
10 about Android. That's it, correct?

11 A Yes. And someone like Mr. Dailey, with his background and
12 experience in the area, would understand exactly what that
13 means.

14 Q Well, what you would expect, what would be typical, is if
15 you thought that Motorola had infringed you would do what you
16 did with respect to ActiveSync, you would have a discussion.
17 You would send claim charts so that the companies could
18 discuss the matter without having this lawsuit hanging over
19 their head where things were kind of -- where the time
20 pressure was really intense. That's what usually happens?

21 A That could commonly happen. Here we had a situation in
22 which we had an experience of trying to renew a license on a
23 subset of patents, and we had all kinds of trouble getting
24 them to actually renew it. So that would have meant just
25 postponing a resolution of the issue, perhaps for many more

1 years.

2 Q But you had presented those claim charts on ActiveSync,
3 you made a specific decision that for four or five months --
4 or April to October, six months -- you were going to prepare
5 yourself to sue Motorola on patents you had never mentioned
6 to them before, correct?

7 A That's correct. And there's nothing unusual about that.

8 Q Well, then it's certainly not true, it is false to say
9 that the reason you sued instead of having discussions was
10 because of the discussions between your colleague and Mr.
11 Dailey about the ActiveSync patents. That's just not true,
12 is it?

13 A No, I disagree with that. I think that was one of the
14 factors that led to the decision to file the action. Because
15 we had experience dealing with Motorola's patent department
16 and had seen how hard it was to get them to acknowledge other
17 people's IP, because they kept talking about how much IP they
18 had. And in making the analysis of the patent situation,
19 vis-à-vis Motorola, we realized there was an issue not only
20 with ActiveSync, but there was also a significant
21 infringement issue with Android. And we had launched a
22 licensing program for Android. We had already a significant
23 licensee who had agreed to enter into an agreement. And we
24 were making sure that the other vendors knew about the
25 existence of the licensing program and that they respected

1 Microsoft's intellectual property. We make those investments
2 and we have an interest in making sure that the billions of
3 dollars that we invest every year are respected. And we were
4 not asking for outrageous terms. These are terms that pretty
5 much everyone else in the industry has agreed to.

6 Q Do you remember my question?

7 A Yes. You had a very complicated question that would have
8 me say that there was no relationship whatsoever between our
9 failure to get Motorola to agree to renew the earlier
10 license, was the reason for why we filed the action. And I'm
11 saying that is not true.

12 Q It's true that you have -- again, you being a lawyer so I
13 think you understand this -- you had no firsthand knowledge
14 at all about the discussions between Mr. Dailey and
15 Ms. Murray concerning those ActiveSync patents where Motorola
16 had had a license for four years for \$100,000, total. You
17 had no firsthand knowledge of that. You weren't present in
18 any discussions, right?

19 A No, I was not. My only firsthand knowledge came from my
20 direct conversations with Mr. Dailey on that.

21 Q In your direct conversations with Mr. Dailey, Mr. Dailey
22 never said anything like, you know, we've got massive
23 patents, or anything -- in fact, one thing he was talking
24 about was, he was talking about patents on wireless e-mail,
25 right? Which are not standard essential.

1 A Well, he might have talked about those specifically. But
2 his statement was to the effect that they had patents, that
3 Microsoft should think twice before taking an action on that.
4 And like we had patents, they felt they had patents that they
5 would think relevant to us.

6 Q He never said that. He never said, "We have patents so
7 you should think twice about taking an action." He never
8 said that prior to October 1, 2010, did he?

9 A Probably not in those words, no. But he was making the
10 point that Motorola had a patent portfolio. And if I wanted
11 to talk about patent issues, he would have patent issues that
12 he would put on the table too.

13 Q What he said was, we would like to get together and have a
14 broader discussion, right?

15 A He said that too.

16 Q And, in fact, in connection with asking for that, he never
17 -- in fact, Motorola had never come to Microsoft and tried to
18 say to Microsoft, you're infringing our standards-essential
19 patents and you need a license. They had never done that,
20 correct?

21 A No, not prior to the October 21st and 29th letters.

22 Q And the reason you filed the October 1, 2010 lawsuit
23 without any warning about filing, on Android patents, is that
24 that month you were setting up a publicity campaign,
25 Microsoft was, about Microsoft's new phone and how the

1 Android system is not free and people are going to have to
2 pay for it?

3 A No. I don't see why you would say that that was the
4 reason why we were filing the lawsuit when we were filing it.

5 Q Well, let me ask you about the timing of it, then. If we
6 can go to the timeline. It's true, is it not, that the
7 lawsuit was filed on October 1st and Microsoft unveiled its
8 Windows Phone 7 ten days later?

9 A I believe that's the case. But that was not the reason
10 why we filed the action.

11 Q And it's also true, is it not, that two days after filing
12 the lawsuit, that the chief executive officer of Microsoft --
13 that was Mr. Ballmer -- had an interview in the Wall Street
14 Journal. You're familiar with the Wall Street Journal,
15 correct?

16 A Oh, yes.

17 Q You read it every day, right?

18 A Sometimes.

19 Q You read it when your chief executive officer has a huge
20 article where he's being interviewed and talking about the
21 business of Microsoft, right?

22 A Sometimes I read those articles, yes.

23 Q When your boss -- not just your boss -- but your "boss" is
24 going to be in a major publication talking about the company,
25 you tend to pay attention to it, right?

1 A I try to. I can't always say that I find the time to do
2 it.

3 Q Let me show you what we've marked as Exhibit 9002 for
4 identification.

5 MR. PRITIKIN: Your Honor, may we see you at side
6 bar, briefly?

7 THE COURT: Yes.

8 (Court and counsel met at side bar.)

9 MR. PRITIKIN: Your Honor, we have been very patient
10 through this questioning. And here's the problem. This
11 entire line of cross, virtually all of it, has no relevance
12 to any issue in the case. If one accepts it as true, all of
13 the things that are being brought out and the arguments they
14 want to make, that we didn't give them warning before we
15 filed the lawsuit, that it was a surprise, that we didn't
16 talk about the patents, that we were about to launch Windows
17 Phone 7, it's not a legally cognizable defense. It just
18 isn't. It has nothing to do with their obligations on their
19 standards-essential patents.

20 And at some point -- I mean we've sat through all of this
21 -- at some point I think perhaps a curative instruction is
22 going to be in order to tell the jury that this has no
23 bearing on their legal obligations. It is not relevant to
24 the issue of good faith, even subjective good faith. The
25 fact that somebody has sued you on patents that are not

1 essential to those standards, it's irrelevant, utterly
2 irrelevant to the question of what they need to do.

3 Now, the latest thing -- and I don't know what on earth
4 there is in this article on Ballmer -- it makes no
5 difference, legally, in terms of the issues in this case
6 whether Microsoft was about to launch its new Windows phone 7
7 or not. It's just not a defense and I think it's confusing
8 the jury.

9 MR. PRICE: Your Honor, Mr. Gutierrez and other
10 people from Microsoft have testified about outrage, shock, et
11 cetera, about these two letters and by Motorola's conduct.
12 Our contention is that is make-believe, that the reason they
13 are saying this is they're trying to tell the world, use us
14 as an example to the world, that the reason they're saying
15 they were shocked by these letters, even though they didn't
16 say a thing about them, and shocked by letters later, and
17 filed these lawsuits, was basically to publicize their
18 agenda.

19 Mr. Gutierrez talked forever about his shock and outrage
20 and what the company felt in connection with the actions of
21 Motorola. And I'm suggesting, and I think there's great
22 evidence to support it, that that is simply made up for this
23 litigation. It's part of litigation tactics. These are
24 litigation tactics. They also create an incredible time
25 pressure with Mr. Dailey, as Mr. Gutierrez knows. It was

1 intended to do that, to create that time pressure. And so
2 that's what this goes to. This case is not what plaintiff
3 thinks it's about and we're entitled to show our theory of
4 the case.

5 THE COURT: In regards to this article, how do you
6 intend to use it? Because it's hearsay.

7 MR. PRICE: It's hearsay. I'm going to ask him if he
8 read it. And I'm not going to say, is it true, because I'm
9 not offering it for the truth.

10 THE COURT: If it's hearsay, it is hearsay. And if
11 he's read it, it is still hearsay.

12 MR. PRICE: It's not for it being true that we're
13 infringing, because that's what it says. Obviously I'm not
14 offering it for that. What I'm offering it for is this
15 timeframe, Microsoft had a publicity push, and this is
16 publicity that they were pushing. And they, in fact,
17 specifically mentioned this lawsuit. What I'm offering it
18 for is to show the reason the lawsuit was filed, the way it
19 was filed, was to tell the world it was filed, you know, that
20 this was part of their publicity campaign, not because of
21 ActiveSync, or these two patents that are nearly worthless.
22 So I'm not offering it for the truth. I'm offering it to
23 show, yes, there was a publicity campaign and he was aware of
24 it.

25 THE COURT: The lawsuit -- the letters come after

1 this.

2 MR. PRICE: Yes.

3 THE COURT: The lawsuit has nothing to do with the
4 RAND rates that are on 802.11 or H.264. I worry that we are
5 straying so far away that the jury at some point is going to
6 wonder which country they're in. How do you respond to that?

7 MR. PRICE: The way I respond, Your Honor, it's an
8 essential part of our defense that Microsoft did not think
9 those two letters in any way had any effect on the business
10 communications between the companies. They're pretending
11 that as part of this October/November timeframe, publicity
12 push, to tell the world, we're going to tax Android, and
13 we're going to sue you if you don't pay us. And then they
14 knew our lawsuits were coming -- not because of anything
15 Mr. Dailey said -- they knew that's what would happen when
16 they sued. This was all planned out in those four or five
17 months. They knew this.

18 THE COURT: Mr. Price, I love your strategy of
19 putting Microsoft on trial. But I'm going to start to put
20 some limits on it. One of the limits is you can ask him
21 about specific things. You're not going to ask him to read
22 this and ask him if he read it. Because even if he read it,
23 you know, we're just getting way, way too far afield.

24 MR. PRICE: May I ask him if he read this, if it
25 refreshes his recollection that two days after the lawsuit

1 was filed that their CEO made this statement that the reason
2 they sued Motorola was to show the world that Android is not
3 free?

4 THE COURT: By the time you've asked him that, then
5 you've put that fact into evidence. You need to find a
6 better way to ask it.

7 MR. PRICE: I'll use it to refresh his recollection,
8 and I'm not reading it. And the only way to do it now is to
9 show him the document. It's the ham-sandwich approach.

10 THE COURT: You can ask him does this refresh his
11 recollection that Mr. Ballmer discussed this. I don't want
12 the content of it to come out. Because it seems to me it's
13 getting way too far afield.

14 MR. PRITIKIN: And, Your Honor.

15 THE COURT: Let me finish. It's getting too far out
16 under 403. I've been very patient in this whole theory of:
17 Let's put the company on trial. It's a really great theory,
18 but at some point we need to start drawing it back. I'm not
19 going to follow Mr. Pritikin's advice and cut you off here,
20 but we need to move on. You guys are running through a lot
21 of time on something that is extremely peripheral. Do you
22 know where you're going? Are you clear -- have I been clear?

23 MR. PRICE: Show that, see if it refreshes his
24 recollection about -- give me those words, so I make sure I
25 get them right.

1 THE COURT: Does this refresh his recollection if
2 Mr. Ballmer ever discussed motivation for filing the lawsuit.

3 MR. PRICE: Okay.

4 (The side bar concluded.)

5 THE COURT: You may proceed.

6 Q Mr. Gutierrez, do you have Exhibit 9002 in front of you?

7 A Yes, I do.

8 Q And have you had a chance to look it over?

9 A I did.

10 Q Okay. Does this refresh your recollection that
11 Mr. Ballmer made statements about the filing of this lawsuit,
12 the October 1st, 2010 lawsuit? Does it refresh your
13 recollection?

14 A I'm sorry, I didn't read that part of the article. Can
15 you direct me to it?

16 Q Sure. If you would look at paragraph -- once you get to
17 the picture you go down to the second paragraph. It's the
18 third paragraph on the page.

19 A On the second page, right?

20 Q No, it's on the first page. You see there's -- it's the
21 third paragraph on the page.

22 A Okay. I see it.

23 Q And my question is, does that refresh your recollection
24 that Mr. Ballmer made statements concerning why this lawsuit,
25 was filed?

1 A To be honest, I don't remember having seen this article
2 before.

3 Q And that's not my question. My question was going to your
4 memory, okay, because the article is hearsay. Does this
5 refresh your recollection that Mr. Ballmer, in this
6 timeframe, made statements about why this lawsuit, the
7 October 2010 lawsuit was filed?

8 A It really doesn't. That paragraph doesn't have a
9 statement from Mr. Ballmer. That seems to be a paragraph
10 written by the reporter.

11 Q If you look at the whole paragraph, does this refresh your
12 recollection?

13 THE COURT: Counsel, let's move on.

14 MR. PRICE: Sure.

15 Q So here we have the timeline -- I think that's still in
16 front of you. We have the timeline. When you contacted
17 Mr. Dailey on October 1, 2010, one of the things you said
18 was, "I'd like you to put your patents on the table,"
19 correct?

20 A I think what I said was phrased differently. But
21 essentially was to the point that Microsoft understood that a
22 resolution of the case might imply Microsoft paying a fair
23 royalty for Motorola's patents and that we were prepared to
24 do that.

25 Q You were the 30(b)(6) witness on these topics?

1 A Correct.

2 Q Is it correct that someone at Microsoft told someone at
3 Motorola that Microsoft wanted Motorola to come forward with
4 its patents?

5 A Yes. My point is it wasn't that first conversation
6 between Mr. Dailey and me. And I don't believe it was me who
7 did that. But somebody did.

8 Q That was the plan. You guys got together and discussed
9 people calling people on October 1st. And that was the plan
10 that someone was going to tell Motorola, "Put your patents
11 forward?"

12 A No. The plan was to tell them, as I said a few times
13 already, that we were open to a resolution of the dispute,
14 and that we understood that that might require us taking a
15 license to their patent portfolio that was relevant to ours
16 and that we were open to do that. I don't believe in that
17 call -- certainly I didn't, since we're talking about
18 firsthand knowledge here, I didn't say, "Send me a list of
19 patents." I said, "We're open to having that discussion."
20 And that was appropriate at that particular point in time.
21 It was a brief conversation; and it was a difficult
22 conversation.

23 Q You've already told us that the expectation is that when
24 you sue someone on patents like these that you're going to
25 get countersued, correct?

1 A That's a common occurrence. So we expected that Motorola
2 would.

3 Q And you were prepared for that. You were prepared for
4 that for four or five months, correct?

5 A As best as you can prepare for something like that. There
6 is only so much preparation that you can do. But we had
7 tried to scope the risk that we would be incurring ourselves.

8 Q And if we -- in your direct examination you said that
9 Microsoft was not trying to put Motorola out of business.
10 You said that in response to questions from your counsel,
11 correct?

12 A That's correct. That wouldn't be a very good business for
13 us if the companies we do deals with would go out of
14 business.

15 Q Well, only -- unless you're trying to make an example of
16 the company, correct?

17 A I can't think of any scenario in which I would want to try
18 to put someone out of business.

19 Q If you look at Exhibit 7119. That's the complaint you
20 filed on October 1, 2010, correct?

21 A Correct.

22 Q And if we go to page 8, page 8 sets forth what Microsoft
23 is asking for in the complaint, correct?

24 A Correct.

25 MR. PRITIKIN: Your Honor, I'm going to object to

1 questions about this on 401, 402 and 403.

2 THE COURT: I'll overrule that objection for the time
3 being.

4 Q Now, on direct you said you weren't trying to put Motorola
5 out of business. If you look at Paragraph F there, you see
6 one of the things Microsoft asked for -- is this correct --
7 is for a grant of a permanent injunction pursuant to 35
8 U.S.C. paragraph 283 enjoining defendant from further acts of
9 infringement. Do you see that?

10 A Yes.

11 Q And a permanent injunction means an order that permanently
12 would prohibit Motorola from selling Android software which
13 is found to infringe Microsoft's patents?

14 A No. What this prohibits is the sale of an Android phone
15 that has the infringing functionality. They can and are
16 technically able to redesign that functionality or remove the
17 functionality in question. I believe, in fact, they have in
18 some cases done that, to work around the Microsoft patents.
19 So that would be a perfectly fine outcome. They no longer
20 infringe because they do the same function in a different
21 way, or in a way that doesn't infringe our patents.

22 Q So before they filed the lawsuit, though, you did an
23 analysis whether or not how it would affect Motorola's
24 business if it had to do a design-around, or someone had to
25 do a design-around and change the Android software. Someone

1 did that?

2 MR. PRITIKIN: Your Honor, same objection, 401, 402,
3 403.

4 THE COURT: We're getting too far afield, counsel.

5 Ladies and gentlemen, Evidence Rule 401 is what is
6 relevant in what you hear. Evidence Rule 402 is what is not
7 relevant. It's what you don't hear. Evidence Rule 403 says
8 sometimes stuff could potentially be relevant, but it takes
9 us off into directions that are not really essential in
10 deciding the lawsuit. So what you hear now is we're trying
11 to stay on one topic; we don't want to get too far off of it.
12 Mr. Price has done a nice job, we're talking about a whole
13 bunch of stuff. I want to keep us somewhat centered on the
14 issue that's before you, as interesting as the rest of this
15 might be. That's what 401, 402 and 403 mean, it's shorthand
16 we all understand.

17 Q You testified on direct examination that in discussions
18 you had with Mr. Dailey between October 1st through
19 October 22nd, you described him saying things about suing
20 Microsoft, correct?

21 A Yes.

22 Q And you knew before you filed the lawsuit that that was
23 probably going to happen, correct?

24 A That's correct.

25 Q And you made statements about -- obviously he seemed to be

1 a little upset when you talked to him?

2 A That's correct.

3 Q You made statements that he said, you know, "Bring on this
4 fight," or something to that? Something like that, "Bring on
5 this fight?"

6 A Yeah, that we're -- "If you want war, we can fight war,
7 and you'll regret it."

8 Q And you testified under oath that in all these
9 conversations you had with Mr. Dailey in October, he never
10 said anything inappropriate under the circumstances; isn't
11 that your sworn testimony?

12 A That's correct. I didn't think anything he said was
13 inappropriate in those conversations.

14 Q And then if we go to the timeline. You received the
15 October 21, 2010 letter, correct?

16 A Correct.

17 Q You had the meeting the very day you received the letter,
18 right?

19 A I received it on the 22nd and we had the meeting on that
20 day.

21 Q And you've explained to the jury how, in your view, the
22 letter was outrageous, correct?

23 A Yes.

24 Q In fact, you mention things like, how could we even figure
25 out what the end sales are, we wouldn't know that, correct?

1 A That's correct.

2 Q And Motorola wouldn't know that either, would they?

3 A They wouldn't.

4 Q And you gave the jury examples of what that would mean to
5 your business and to your product?

6 A Yes.

7 Q So you had this conversation on the 22nd. You were trying
8 to be friendly, correct?

9 A Yes.

10 Q So you joked that, "We received your missive," correct?

11 A Correct.

12 Q And in a friendly manner, you know, did you say anything
13 like, you know, "This is outrageous. What are you guys
14 trying to do here?"

15 A No, I did not.

16 Q Did you say, in a friendly manner, "Look, you know, this
17 is not a way to start discussions, we're going to move
18 forward as this never happened?"

19 A No, we didn't say that. I think, when you have a
20 situation like that you can choose a couple paths. You can
21 choose a path of acrimony and argument and focus on what
22 separates the people, or you can choose to try to focus on
23 exploring a path forward. And I felt that the best approach
24 at the time -- and it was the one that we followed -- is to
25 just park that issue aside and try to focus on building some

1 consensus on a path to try to resolve the issue. And if we
2 were successful on that, then those issues would go away
3 naturally.

4 THE COURT: Mr. Price, is this a good time to stop?

5 MR. PRICE: Sure.

6 THE COURT: Ladies and gentlemen, I'm going to give
7 you the abbreviated version and then send you home for the
8 evening. Don't discuss the case with anyone -- and I won't
9 pick on your fellow jurors because you won't see them until
10 tomorrow morning. But I will say, at least in my family when
11 my wife was on jury duty, everyone at the dinner table wanted
12 to know what the case was about and what she thought. She
13 steadfastly said she couldn't talk about it. We tried hard.

14 Since then the internet chat room, blogs, Facebook,
15 Twitter, any of those other things that I know you're not
16 doing. If anyone tries to communicate with you about the
17 case, please let me know about it immediately. It is an
18 issue in this case not to read, watch, or listen to any news
19 reports or other accounts, or anyone that's associated with
20 it, including any online information.

21 I'm sincere, if you've got someone who wants to clip the
22 paper and save all that for you and keep them around. And
23 when it's done, you're welcome to read what they have to say.

24 Don't do any research. Keep an open mind until all the
25 evidence has been presented. And at that time you're going

1 to hear the arguments of counsel, my instructions, then
2 deliberate with your fellow jurors. At that point you'll be
3 able to make a decision.

4 We are moving along quite promptly. Counsel are doing a
5 very fine job of keeping us on track here. I think that my
6 estimations about your getting the case on Wednesday are,
7 indeed, accurate. We won't have court on Monday, so plan on
8 a three-day holiday. The last thing you'll hear on Friday
9 is, "Remember until the trial is over do not discuss this
10 case with anyone."

11 Other than that, I'm not sure what the weather forecast
12 is. But it will rain for rush hour, then be 80 degrees in
13 the afternoon. So what can I say?

14 (The following occurred outside the presence of the jury.)

15 THE COURT: Counsel, once again, I do this on the
16 fly, but by my notes reflect Microsoft used 2 hours
17 28 minutes today, and Motorola used 3 hours 2 minutes. So
18 I'll give you, tomorrow morning, the formal time count and
19 where you are.

20 Mr. Harrigan, anything we need to take up at this time?

21 MR. HARRIGAN: Not that I know of Your Honor.

22 THE COURT: Mr. Price?

23 MR. PRICE: Just one thing, Your Honor. And
24 obviously we're on the clock. And I usually try to take my
25 cue from the judge as to whether or not it's appropriate to

1 move to strike, or ask him to just answer a yes or no
2 question yes or no. Mr. Gutierrez likes to talk about his
3 entire case -- and I understand that -- when I ask a
4 yes-or-no question. So my question is, am I on my own? Or
5 may I start requesting relief from the court if the court
6 thinks it's appropriate?

7 THE COURT: You would have lost most of those
8 requests today because you have a propensity, sir, to make a
9 very long statement, then ask a yes-or-no question. I think
10 the witness, then, gets to respond. If you ask pure yes or
11 no questions, then I'll prompt him on my own. And if I
12 don't, you're welcome to ask that I do so, and strike it, and
13 he needs to answer.

14 You have to strike a fine balance here. The balance is
15 between allowing the witness to testify and not making it
16 look like you're going to put words in his mouth. And the
17 alternative of making sure he's responsive to your questions
18 and not just giving speeches.

19 I'm very complimentary of the fact that you've moved
20 through a lot of material today. And I didn't hear you being
21 repetitive, except for one exception very early on. And at
22 that point I was getting ready to say something to both of
23 you, like at the point that one of the parties is described
24 as a horse -- the words are coming from the horse's mouth,
25 normally is a good indication that it's time to move on to a

1 new subject.

2 MR. PRICE: So may the horse's mouth now ask you,
3 Your Honor, there was some confusion this morning about the
4 time for closings, not the 90-minute part, but you said
5 something about getting the full 16 hours for court time. So
6 we're trying to figure out, did you mean we're getting
7 90 minutes closing --

8 THE COURT: In addition.

9 MR. PRICE: In addition. I lost my bet.

10 THE COURT: You're doing a nice job. We had a bad
11 patch this morning on sidebars. I really do discourage
12 sidebars, because the jury just sits there and we're not
13 using their time wisely. But by my recollection, my
14 calculations, we should be doing closing arguments on
15 Wednesday morning. That's time that I reserved for me to
16 make rulings, and whatever. And I'm happy to donate it to
17 all of you to make your closings, if it's available. And it
18 appears it will be.

19 All right. Who do we have for witnesses tomorrow?

20 MR. HARRIGAN: We have one deposition which is
21 Mr. Blasius. We have Mr. Davidson. We have Mr. Heiner. We
22 have Mr. Brandenburg and Mr. Killough. And somebody else --
23 and Dr. Murphy.

24 THE COURT: You've got a lot to do in 8 hours and
25 16 minutes, if my calculations are right.

1 MR. PRICE: Can we get an idea of the order?

2 THE COURT: If you can't -- just go over and talk to
3 him. It's a novel concept, I know, for you guys. We'll be
4 in recess. Thank you, counsel.

5 (The proceedings recessed.)

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C E R T I F I C A T E

We, Barry Fanning and Debbie Zurn, Official Court Reporters for the United States District Court, Western District of Washington, certify that the foregoing is a true and correct transcript from the record of proceedings in the above-entitled matter.

DATED this 25th day of November, 2013.

/s/ Barry Fanning

/s/ Debbie Zurn

Barry Fanning, Court Reporter

Debbie Zurn, Court Reporter

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